

No. 11639

United States
Circuit Court of Appeals

For the Ninth Circuit.

HANSEN & ROWLAND, INC., a corporation,
Appellant,
vs.

C. F. LYTLE COMPANY, INC., a corporation,
and GREEN CONSTRUCTION COMPANY,
a corporation,
Appellees.

Transcript of Record

IN TWO VOLUMES

VOLUME I

Pages 1 to 466

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

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COUNSEL OF RECORD

CHARLES T. PETERSON, Esq.

528 Perkins Building, Tacoma, Washington

Attorney for Plaintiff-Appellee.

J. CHARLES DENNIS, Esq.

United States District Attorney

HARRY SAGER, Esq.

Assistant United States District Attorney

324 Federal Building, Tacoma, Washington

Attorneys for Defendant-Appellants.

In the Superior Court of the State of Washington
In and For the County of Pierce

556

No. 89705

HANSEN AND ROWLAND, INC., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, Incorporated, a corporation,
and GREEN CONSTRUCTION
COMPANY, a corporation,
Defendants.

Certified Copy of Entire Record on Removal from
the Superior Court of the State of Washington In
and For Pierce County, Washington to the United
States District Court of the Western District of
Washington, Southern Division at Tacoma.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division, Aug. 13, 1943. [1*]

[Title of Superior Court and Cause.]

COMPLAINT

Plaintiff complaining of Defendants, says:

I.

Plaintiff is a corporation organized under the

*Page numbering appearing at foot of page of original certified
Transcript of Record.

laws of the State of Washington, and has paid its annual license fees to the State of Washington for the year last past.

II.

Defendant, C. F. Lytle Company, Incorporated, is a corporation organized under the laws of the State of Iowa, and doing business in the State of Washington.

III.

Green Construction Company is a corporation organized under the laws of the State of Iowa and doing business in the State of Washington.

IV.

That on the 17th day of July, 1942, Phoenix Indemnity Company, a corporation, authorized to do business as surety in the State of Washington and Territory of Alaska, at the special instance and request of Defendants, issued its certain policy of insurance No. C. L. P. 1750, to Defendants, at Tacoma, Washington, insuring and protecting Defendants, and each of them, from legal liability and damages against bodily injury liability, automobile property damage [2] liability, and property damage liability other than automobile, within certain limits described in said policy, on account of the performance of certain work and activities by said Defendants, which work and activities are described in said policy.

V.

That as a consideration and premium for the in-

insurance and indemnity afforded by said policy of insurance, said Defendants agreed to pay to said Phoenix Indemnity Company eighty-five cents on each one hundred dollars of all remuneration earned by the employees of Defendants and the employers of any contractors and subcontractors associated with or employed by Defendants in connection with the performance of said work and activities described in said policy of insurance.

VI.

That during the period said insurance was in effect, from June 17th 1942, to September 1st, 1942, the remuneration earned by employees of Defendants, and contractors and subcontractors associated with nor employed by them in connection with the work and activities performed by them described in said policy, and on which premiums became payable under said policy, amounted to the sum of \$1,055,214.02.

VII.

That said policy of insurance contained among others, the following provisions:

“Cancellation. This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancelation shall be effective. The mailing of [3] notice as aforesaid shall be sufficient proof of notice

and the insurance under this policy shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

“If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company’s check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.”

VIII.

That in accordance with said policy of insurance providing for cancelation, said Defendants on September 3rd, 1942, by writing addressed to Hansen & Rowland, Inc., canceled said policy of insurance effective September 1st, 1942.

IX.

That based on the premium rate on account of earned payroll of the employees of Defendants and associated contractors and subcontractors in the performance of said work and activities, the earned premium computed in accordance with the customary short rate table and procedure was and is the sum of \$16,153.73, and by reason of the facts

herein above set forth, Defendants became indebted to said Phoenix Indemnity Company in the sum of \$16,153.73, no part of which has been paid. [4]

X.

That on October 7th, 1942, said Phoenix Indemnity Company furnished and delivered to Defendants a statement of its account and of the amount owing by Defendants to Phoenix Indemnity Company, which account and statement was in the sum of \$16,153.73.

XI.

That on January 30, 1943, Defendants assented in writing to said statement of account, so rendered to them by Phoenix Indemnity Company, and admitted their liability to pay the same.

XII.

The said Phoenix Indemnity Company has, by instrument in writing, duly assigned its said claim and demand against Defendants to Plaintiff, who is the owner and holder thereof.

Wherefore, Plaintiff prays judgment against Defendants, and each of them, in the sum of \$16,153.73, with interest at six per cent per annum from September 1st, 1942, and for costs of suit.

CHARLES T. PETERSON
LESTER SEINFELD,
Attorneys for Plaintiff.

State of Washington,
County of Pierce—ss.

I. C. Rowland, being first duly sworn, on oath deposes and says:

That he is the Secretary of Hansen & Rowland, Inc. a corporation, Plaintiff above named, and makes this verification for and in its behalf; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

I. C. ROWLAND. [5]

Subscribed and sworn to before me this 10th day of July A. D. 1943.

[Seal] A. VAN R. SCHERMERHORN
Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed in County Clerks Office.
Pierce County, Wash., Aug. 5, 1943. [6]

[Title of Superior Court and Cause.]

SUMMONS

The State of Washington to C. F. Lytle Company,
Incorporated, a corporation, and Green Construction Company, a corporation, Defendants.

You Are Hereby Summoned to appear within twenty days after service of this summons upon you, exclusive of the day of service, if served within the State of Washington; or within sixty days after service upon you, exclusive of the dat of service, if

served out of the State of Washington, and answer the complaint and serve a copy of your answer upon the undersigned at the place below specified, and defend the above entitled action in the Court aforesaid, and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which will be filed with the Clerk of said Court, a copy of which is hereby served upon you.

CHARLES T. PETERSON
LESTER SEINFELD

Attorneys for Plaintiff.

[Endorsed]: Filed in County Clerks Office Aug.
5, 1943. [7]

[Title of Superior Court and Cause.]

NOTICE OF FILING AND PRESENTATION
OF PETITION AND BOND FOR REMOVAL

To: Hansen & Rowland, Inc., a corporation, plaintiff, and Charles T. Peterson and Lester Seinfeld, its attorneys:

You, and each of you, are hereby notified that the defendants above named, on Monday, the 2nd day of August, 1943, will file, in the Superior Court of the State of Washington, Pierce County, their petition and bond for the removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Southern Division, and that they will thereafter, on the 2nd day of August, 1943, present to the presiding judge of

the said Superior Court their said petition and request the said Court for an order approving said bond and ordering the removal of this action to the said District Court of the United States for the Western District of Washington, Southern Division, all in accordance with the terms of said petition, copies of which petition and bond are hereto attached.

Dated this 30th day of July, 1943.

J. CHARLES DENNIS

HARRY SAGER,

Attorneys for Defendants.

Copy received 2nd day of August 1943.

CHARLES T. PETERSON

Attorney for Plaintiff. R.V.P.

[Endorsed]: Filed in County Clerks Office, Pierce County, Wash., Aug. 2, 1943. [8]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Come now the defendants above named, and for their petition herein respectfully represent to the court as follows:

I.

That the above entitled action is an action at law of a civil nature, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That the plaintiff, Hansen and Rowland, Inc., is a corporation organized and existing under the laws of the State of Washington, and as such, is a citizen of the State of Washington. That the defendants, C. F. Lytle Co., Inc. and Green Construction Co., and each of them are corporations organized and existing under and by virtue of the laws of the State of Iowa, and as such they are citizens of the State of Iowa. That the citizen status of the respective parties to this cause, as herein alleged, has been the same at all times since prior to the commencement of this action. That this action is, therefore, one between citizens of different states.

[9]

III.

That your petitioners, the defendants in this cause, offer herewith a bond, with good and sufficient surety, conditioned for their entry and filing, in the District Court of the United States for the Western District of Washington, Southern Division, within 30 days of the filing of this petition, a certified copy of the record of this action in this Court, and for paying all costs that may be awarded by the said District Court of the United States if said District Court shall hold that this action is wrongfully or improperly removed thereto.

Wherefore, your petitioners pray that the above entitled Court accept said bond, and that it proceed no further in this cause, except to order the removal thereof to the District Court of the United States for the Western District of Washington,

Southern Division, and that it direct the Clerk of the Above entitled Court to prepare a complete transcript and copy of the record in the above entitled action, and certify the same as being a true copy of such record, so that your petitioners may file said certified record with the District Court of the United States for the Western District of Washington, Southern Division.

J. CHARLES DENNIS

HARRY SAGER

Attorneys for Defendants.

State of Washington,
County of Pierce—ss.

George Roach, being first duly sworn, upon his oath, deposes and says: That he is Branch Manager for the defendant C. F. Lytle Co., Inc., a corporation, and one of the defendants and petitioners herein, and as such Branch Manager, he is authorized and does make this verification [10] for and on behalf of said defendant; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

GEORGE ROACH.

Subscribed and sworn to before me this 30th day of July, 1943.

HARRY SAGER

Notary Public in and for the State of Washington,
residing at Sumner.

[Endorsed]: Filed in County Clerks Office,
Pierce County, Wash. Aug. 2, 1943. [11]

[Title of Superior Court and Cause.]

UNITED STATES FIDELITY AND
GUARANTY COMPANY

Baltimore, Maryland

No. 17737

\$500.00

BOND

Know All Men by These Presents:

That we, the C. F. Lytle Company, a corporation, and Green Construction Co., a corporation, the above named defendants, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound to Hansen & Rowland, Inc., a corporation, plaintiff in the above entitled cause, their successors and assigns, in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents. Consideration of this obligation is such that:

Whereas, the said C. F. Lytle Company, a corporation and Green Construction Co., a corporation, have applied by petition to the Superior Court, Pierce County, State of Washington, for the removal of the above entitled cause therein pending to the United States District Court for the Western District of Washington, Southern Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court of Pierce County, State of Washington, be stayed: [12]

Now, Therefore, if the said petitioners, the C. F. Lytle Company, a corporation, and Green Construction Co., a corporation, shall enter in the said United States District court for the Western District of Washington, Southern Division aforesaid, within thirty (30) days from the date of filing of said petition, a certified copy of the record in such suit and shall pay, or cause to be paid, all costs that may be awarded by said District Court of the United States if the said court shall hold that said suit was wrongfully or improperly removed thereto: then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof we, the above and undersigned named principals and surety have *cause* this instrument to be executed and our hands and seals affixed thereto this 30th day of July, 1943.

C. F. LYTLE COMPANY,
a corporation, and
GREEN CONSTRUCTION CO.,
a corporation.

By GEORGE ROACH
Their Attorney-in-Fact,
Principals.

[Corporate Seal] UNITED STATES FIDELITY
& GUARANTY CO.,

By ELWIN A. DEYO
Surety
Its Attorney in Fact.

Entered Journal U, Page 136.

[Endorsed]: Filed in County Clerks Office Aug.
2, 1943, Pierce County, Wash. [13]

State of Washington,
County of Pierce—ss.

On this 30th day of July, 1943, before me personally appeared Elwin A. Deyo, to me *know* to be the Attorney-In-Fact of the Corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and *pruposes* therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] W. F. KERR

Notary Public in and for the State of Washington,
residing Tacoma.

State of Washington,
County of Pierce—ss.

On this 30th day of July, 1943, before me personally appeared George Roach, to me known to be the individual who executed the within and foregoing instrument as Attorney-In-Fact for the C. F. Lytle Co., Incorporated, a corporation, and the Green Construction Co., a corporation, and acknowledged said instrument to be the free and voluntary act and deed of said corporations, for the uses and purposes therein mentioned, and on oath stated that he was the Attorney-In-Fact for said corporations,

and that he was authorized to execute said instrument for and on behalf of said corporations.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

G. A. B. DOVELL

Notary Public in and for the State of Washington,
residing in Tacoma. [14]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The above entitled matter coming on regularly before the Court upon the application and petition of the defendants, petitioning for the removal of the above entitled cause to the District Court for the Western District of Washington, Southern Division; and it appearing to the Court that notice of the filing of said petition and bond has been given to the plaintiff; and, further, that said petitioners have filed herein a bond with good and sufficient surety, conditioned for their filing in the District Court of the United States for the Western District of Washington, Southern Division, within 30 days of the date of filing of said petition, a certified copy of the record in this cause and Court, and for paying all costs that may be awarded by the said District Court if it shall hold that said cause was wrongfully or improperly removed thereto; and it further appearing that this is a cause of a civil

nature, between citizens of different states, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00); and the Court being fully advised in the premises, it is therefore

Ordered that the above entitled action be, and the same hereby is, removed in its entirety from this Court to the District Court of the United States for the Western District of Washington, Southern Division; that any further [15] proceedings in this Court be, and the same are, hereby stayed; that the Clerk of this Court be and she hereby is instructed and directed to prepare and certify a complete transcript and copy of the records and files in this cause, and to deliver the same to the Attorneys for the defendants upon their payment of the statutory fee therefor. It is further

Ordered that the bond heretofore filed in this cause by the defendants be, and the same hereby is, approved.

Done in Open Court this 2 day of Aug. 1943.

By the Court

E. D. HODGE

Judge.

Presented by:

HARRY SAGER

Attorney for Defendants.

O.K.

CHARLES T. PETERSON

Attorney for Plaintiff.

[Endorsed]: Filed in County Clerks Office Aug.
2, 1943, Pierce County, Wash.

Entered Jour 274, Page 52. [16]

[Title of Superior Court and Cause.]

CERTIFICATE OF REMOVAL TO U. S.
DISTRICT COURT

State of Washington,
County of Pierce—ss.

I, Kathryn E. Malstrom, County Clerk, and by virtue of the Laws of the State of Washington, ex-officio Clerk of the Superior Court of the State of Washington, in and for Pierce County, do hereby certify that I have compared the foregoing copy of the Complaint, Summons, Notice of Filing Petition and Bond for Removal, Petition for Removal, Bond and Order of Removal, to the United States District Court, for the Western District of Washington, Southern Division, at Tacoma, with the originals in the above entitled action, now on file and of record in this office, and that the same is a true and correct copy of the whole and every part of the original record in said action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, at my office in the City of Tacoma, this 10th day of August, 1943.

[Seal]

KATHRYN E. MALSTROM,
County Clerk.

By E. M. OSTROM,
Deputy. [17]

United States District Court, Western District of
Washington, Southern Division

No. 556

HANSEN & ROWLAND, INC., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation, and
GREEN CONSTRUCTION COMPANY, a
corporation,

Defendant.

SECOND AMENDED ANSWER

Comes now the defendants, and for their answer to the plaintiff's complaint admit, deny, and allege as follows:

I.

Answering paragraph VI of said complaint, defendants deny the same and the whole thereof, and specifically deny that the remuneration earned by employees of defendants, and contractors and sub-

contractors associated with or employed by them in connection with the work and activities performed by them as described in said policy, exceeded the sum of \$3745.00.

II.

Answering paragraph IX of said complaint, defendants deny the same and specifically deny that the defendants became indebted to said Phoenix Indemnity Company in the sum of \$16,153.73 or in any sum in excess of \$8.59. Defendants admit that no part of said premium has been paid.

III.

Answering paragraph X of said complaint, defendants admit that on October 7, 1942, said Phoenix Indemnity Company furnished and delivered to defendants, a statement claiming premium due in the sum of \$16,153.73. Defendants [35] deny the remaining allegations in said paragraph.

IV.

Answering paragraph XI of said complaint, defendants deny the same and the whole thereof.

V.

Answering paragraph XII of said complaint, defendants allege that they have not sufficient knowledge or information of the facts therein alleged to form a belief as to the truth thereof, and therefore deny the same.

Further answering said complaint, and by way of first affirmative defense, defendants allege:

I.

That on or about May 4, 1942 the defendants herein entered into a certain contract with the United States of America; that by the terms of said contract the defendants contracted to furnish to the said United States of America engineering-management services in the construction of a certain portion of the Alaska Highway. That the said contract is what is commonly known as a "cost plus fixed fee contract" and by the terms thereof the defendants were to be compensated by a fixed fee, and all costs incurred by defendants, in carrying out said contract, were to be repaid by the said United States. That under the terms of said contract, costs incurred by defendants in performance of the said contract were subject to the audit and approval of the Public Roads Administration, an administrative agency of the said United States.

II.

That the premium on the insurance policy alleged in plaintiff's complaint is one of the items of costs incurred by the defendants in carrying out their said [36] contract with the United States.

III.

That the foregoing facts were well known by the plaintiff and by the Phoenix Indemnity Company at the time of the issuance of the policy of insurance set forth in paragraph IV of the plaintiff's complaint, and at all times thereafter.

IV.

That on or about July 30, 1942 the said policy of insurance was submitted by the plaintiff to the Public Roads Administration for approval and that at all times since, until the commencement of this action, the said Public Roads Administration carried on negotiations with the plaintiff and with the said Phoenix Indemnity Company for an adjustment of the premium alleged to be due upon said policy by the plaintiff. That in carrying on said negotiations said Public Roads Administration was acting for and on behalf of itself and of these defendants, which fact was well known to the plaintiff, and the said Phoenix Indemnity Company.

Further answering said Complaint, and by way of second affirmative defense, defendants allege:

I.

That the writing alleged in Paragraph XI of plaintiff's complaint was written to plaintiff by defendants under a mistake of fact, which mistake of fact was as follows: That the defendants mistakenly thought and assumed that the employees engaged in performing the contract of these defendants, and of the several associate contractors, were employees of said contractors when, in fact, said persons were employees of the United States Government. [37]

II.

That during the period in which the aforesaid insurance contract was in force certain statements of the payroll of the defendants, and associate con-

tractors, were transmitted to plaintiff for the purpose of determining the amount of premium based upon such payroll. That said statements of payroll were erroneous and mistaken in the assumption that said payrolls were payrolls of employees of the said contractors when, in truth and fact they represented the payrolls of employees of the United States Government.

Wherefor, defendants pray that judgment be entered herein in favor of the plaintiff and against the defendants for the sum of \$8.59, and for no more, and that defendants have judgment for their costs against the plaintiff.

S/ J. CHARLES DENNIS

United States Attorney

S/ HARRY SAGER

Assistant United States
Attorney

[Endorsed]: Filed Sep. 6, 1944. [38]

United States of America,
Western District of Washington,
Southern Division—ss.

Harry Sager, being first duly sworn upon his oath, deposes and says, that he is one of the attorneys for the defendants in the above entitled cause, and that he makes this verification for and on behalf of said defendants for the reason that no officer of either of said defendants is now present within the Western District of Washington; that

affiant has read the foregoing Second Amended Answer, knows the contents thereof, and believes the same to be true.

S/ HARRY SAGER

Subscribed and Sworn to before me this 6th day of September, 1944.

[Seal] G. A. B. DOVELL

Notary Public in and for the State of Washington, residing in Pierce County.

[Title of District Court and Cause.]

FINDING OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial before the Court sitting without a Jury (such trial to the Court being agreed to by the respective parties), plaintiff appearing by Charles T. Peterson and James L. Conley, its attorneys, defendant appearing by J. Chas. Dennis, U. S. District Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant U. S. Attorney; the trial of said cause proceeded by the introduction of evidence in behalf of the respective parties, and at the conclusion thereof, and after the parties respectively had rested, the Court announced that it would find for the plaintiff and against defendants, and gave counsel for defendants an opportunity to present such argument as he chose to make, and at the conclusion of such argument, the

Court found in favor of plaintiff and against defendants, and directed that Findings be submitted in accordance with such decision, and now, the Court being fully advised in the premised, doth make the following Findings of Fact and Conclusion of Law:

1. That plaintiff is a corporation organized under the laws of the State of Washington, and has paid its annual license fees to the State of Washington for the year last past. [40]

2. That defendant, C. F. Lytle Company, Incorporated, is a corporation organized under the laws of the State of Iowa, and doing business in the State of Washington;

3. That Green Construction Company is a corporation organized under the laws of the State of Iowa and doing business in the State of Washington;

4. That on or about May 4, 1942, defendants entered into a contract with the United States Government through the Agency of the Federal Works Administrator, for the construction of a portion of a highway known as the Alaska-Canada Highway, Project No. 3, from a point on the International Boundary line between Canada and Alaska to a point near Salana, Alaska, being approximately 155 miles. That by the terms of said contract defendants undertook to recruit the services of an adequate number of competent and experienced contractors with equipment and personnel, and to obtain the necessary labor to complete said roadway in the shortest possible time.

5. That said contract contained among other provisions, one by which the Federal Works Administrator reserved the right without notice to sureties, to make changes in, or additions to the original plans and specifications, and require additional work, and order work on other sections of the highway in Alaska, not included in said 155-mile section.

6. That the major portion of the work performed by defendants and said contractors under said contract, between June 17th, 1942, and September 1st, 1942, was performed on sections of said highway in Alaska outside of said 155-mile limits. That said outside sections were generally of the same character of terrain and conditions were generally the same thereon as on said 155-mile section, and the same kind of work was performed [41] on said outside sections as was described in said contract and performed on said 155-mile section.

7. That said contract contained a further provision that defendants would procure and thereafter maintain such bonds and insurance for the protection of the Government or for the protection of defendants, in such forms and in such amounts and for such periods of time as the Federal Works Administrator would approve or require as reasonably necessary.

8. That some time prior to June 10th, 1942, defendants requested three different insurance agencies, including plaintiff, to submit proposals or bids for providing public liability and property

damage insurance in connection with the work to be performed under said contract.

That on or about June 10th, 1942, defendants received a telegram from one MacDonald, Chief of the Public Roads Administration, and a person in authority, a copy of which said telegram is as follows:

CA407 51 Govt - Washington DC 10 207 P 1942, Jun 10 PM 1 34

H. L. Rice—care of C. F. Lytle Co., Sioux City, Iowa

Pending Final Information From Insurance Section of Federal Works Agency You Are Authorized To Secure Such Public Liability and Property Damage Insurance As Is Necessary to Protect the Management and Construction Contractors It Should Be Understood That These May Be Short Term Policies to Be Cancelled When Detailed Information Is Available.

MacDONALD

9. That prior to the 17th day of June, 1942, defendants applied to plaintiff, agent for comprehensive public liability and property damage insurance, insuring them and the contractors recruited by them, against public liability and property damage. That on June 17, 1942, plaintiff, agent for Phoenix Indemnity Company, an [42] insurance company authorized to do an insurance business in the State of Washington and Territory of Alaska, issued a temporary binder effective June 17, 1942, insuring defendants and the con-

tractors recruited by them pursuant to the terms of their contracts against public liability and property damage, and on the same day delivered copies of said binder to defendants and to J. S. Bright, District Engineer, Federal Works Agency, at Seattle, Washington. That thereafter, on July 30, 1942, plaintiffs mailed duplicate originals of the policy of insurance (a copy of which was introduced in evidence herein, marked plaintiff's Exhibit "4") to the defendants, and to Federal Works Agency, Public Roads Administration, 303 Hoge Building, Seattle, Washington, attention of J. S. Bright.

10. That as a consideration and a premium for the insurance and indemnity afforded by said policy of insurance, said Defendants agreed to pay to said Phoenix Indemnity Company eighty-five cents on each one hundred dollars of all remuneration earned by the employees of defendants and the employees of any contractors and sub-contractors associated with or employed by defendants in connection with the performance of said work and activities described in said policy of insurance.

11. That said contract between the Federal Works Administrator and defendants contained the following provision:

"The Government reserves the right to pay directly to the persons concerned all sums due from the Project Manager for labor, materials, or other charges."

That in pursuance of said provision, the Govern-

ment elected to pay directly to the employees for labor performed on said project. [43]

12. That the laborers employed for the performance of the work agreed to be performed by defendants and the contractors recruited by defendants in pursuance of said contract, were recruited almost entirely by defendants, and said contractors with the approval of the Public Roads Administration, and were accepted on a civil service status, to the end that the Government might disburse public monies direct to said employees, but said employees were in fact the employees of the defendants and said contractors, and received all instructions and orders from them, and said employees were not subject to any direct orders, directions or instructions from the representatives of the United States Government in carrying on said work, and did not receive any orders or directions with respect to the manner, means or methods of doing their work from the representatives of the United States Government.

13. That during the period said insurance was in effect, from June 17th, 1942, to September 1st, 1942, the remuneration earned by employees of defendants and contractors and sub-contractors associated with or employed by them in connection with the work and activities performed by them described in said policy, and on which premiums became payable under said policy, amounted to the sum of \$1,055,214.02.

14. That said policy of insurance contained among others, the following provision:

“***If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure.
***”

15. That in accordance with said policy of insurance providing for cancellation, said defendants (insured), on September 3rd, 1942, by writing addressed to Hansen & Rowland, Inc., Agents for Phoenix Indemnity Company, [44] cancelled said policy of insurance, effective September 1st, 1942.

16. That based on the premium rate on account of earned payroll of the employees of defendants and associated contractors and sub-contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and procedure was and is the sum of \$16,153.73, no part of which has been paid, although demand has been made therefor.

17. The said Phoenix Indemnity Company has heretofore by instrument in writing, duly assigned its said claim and demand against defendants to plaintiff, who is the owner and holder thereof.

Dated September 22nd, 1944.

CHARLES H. LEAVY,

United States District Judge

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. That plaintiff is entitled to have and recover judgment of and against defendants and each of them in the sum of \$16,153.73, with interest thereon

at the rate of six per cent per annum from September 1st, 1942, and for costs of suit.

Dated September 22, 1944. Defendants except to foregoing Findings of Fact and Conclusions of Law and exceptions allowed. (C.H.L.)

CHARLES H. LEAVY

United States District Judge

Presented by:

CHARLES T. PETERSON

Attorney for Plaintiff.

Served Sept. 14, 1944

[Endorsed]: Filed Sep. 22, 1944. [45]

United States District Court, Western District of
Washington, Southern Division

No. 556

HANSEN & ROWLAND, INC., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation,
and GREEN CONSTRUCTION COMPANY,
a corporation,

Defendants.

JUDGMENT

This cause coming regularly for trial before the Court sitting without a Jury (such trial to the Court being agreed to by the respective parties),

plaintiff appearing by Charles T. Peterson and James L. Conley, its attorneys, defendant appearing by J. Chas. Dennis, U. S. District Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant U. S. Attorney; the trial of said cause proceeded by the introduction of evidence in behalf of the respective parties, and at the conclusion thereof, and after the parties respectively had rested, the Court announced that it would find for the plaintiff and against the defendants, and gave counsel for defendants an opportunity to present such argument as he chose to make, and at the conclusion of such argument, the Court found in favor of plaintiff and against defendants, and directed that Findings be submitted in accordance with such decision, and the Court having duly made its Findings of Fact and Conclusions of Law herein in writing, wherein it found for the plaintiff and against the defendants, and each of them, it is now

Ordered, Adjudged and Decreed that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover [46] of and from C. F. Lytle Company, Inc., a corporation, of the State of Iowa, and Green Construction Company, a corporation, of the State of Iowa, and each of them, the principal sum of \$16,153.73, together with interest thereon at the rate of six per cent per annum from September 1st, 1942, together with costs in the sum of \$94.00.

Dated September 22nd, 1944.

Defendants except to foregoing Judgment and exceptions allowed.

CHARLES H. LEAVY

United States District Judge

Presented by:

S/ CHARLES T. PETERSEN

Attorney for Plaintiff.

Receipt of copy of foregoing Judgment, together with copy of Findings of Fact and Conclusions of Law, is hereby acknowledged this 14th day of September, 1944.

HARRY SAGER

Attorney for Defendants,

D.B.

[Endorsed]: Filed Sep. 22, 1944. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 22nd day of September, 1944.

Dated at Tacoma, Washington, this 20th day of December, 1944.

(Signed) J. CHARLES DENNIS

United States Attorney

(Signed) HARRY SAGER

Assistant United States Attorney, Attorneys for Defendants.

Copy of the within Notice of Appeal mailed to Charles T. Peterson, attorney for plaintiff, at Perkins Building, Tacoma, Washington, this 21st day of December, 1944.

E. E. REDMAYNE

Dep. Clerk.

[Endorsed]: Filed Dec. 20, 1944. [48]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 57, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 556, Hansen & Rowland, Inc., a corporation, Plaintiff-Appellee, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants-Appellants, as required by Appellants' Designation of the Record on Ap-

peal, on file and of record in my office at Tacoma, Washington, and the same, together with the original Transcript of Testimony, consisting of pages numbered 1 to 310, inclusive, the original Statement of Points to be Relied Upon in the Circuit Court, the original Designation of Appellants of the Parts of the Record to be printed in the Circuit Court, and original exhibits, numbered as follows, to-wit: Plaintiff's Exhibits Nos. 2, 4, 6, 7, 8, 9, 10, 12, 13, 14 and 17, and Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6 and A-10, constitutes the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit. [58]

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Transcript of Testimony, consisting of pages numbered 1 to 310, inclusive, the original Statement of Points to be Relied Upon in the Circuit Court, the original Designation of Appellants of the Parts of the Record to be Printed in the Circuit Court, and original exhibits, numbered as follows: Plaintiff's Exhibits Nos. 2, 4, 6, 7, 8, 9, 10, 12, 13, 14 and 17, and Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6 and A-10.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee	\$ 5.00
Clerk's fee for preparing, comparing and certifying the Transcript of Record on Appeal of the Defend- ant-Appellants	19.55

\$24.55

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 16th day of March, 1945.

[Seal] MILLARD P. THOMAS,
Clerk.

By E. E. REDMAYNE,
Deputy. [59]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 556

HANSEN & ROWLAND, INC., a corporation,
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation,
and GREEN CONSTRUCTION COMPANY, a
corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 6th day of Septem-

ber, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, in the City of Tacoma, and State of Washington; the plaintiff appearing by its attorneys Messrs. Charles T. Peterson and J. L. Conley, and the defendants appearing by Harry Sager, Esq., Assistant United States Attorney, and

Whereupon the following proceedings were had and testimony given, to-wit: [1*]

Mr. Peterson: Your Honor will recall that there and an application—or rather, interrogatories were propounded, and that the Court made an order for the production of certain documents. I am advised by Mr. Sager that the answers to the interrogatories are not here, and the documents as well, as I understand, likely due to the fact that Mr. Rice, who was to have produced the documents and answer the interrogatories, was away when the interrogatories and the order reached his office in Sioux City, Iowa. I understand from Mr. Sager that those will be mailed, or are likely to be here tomorrow.

We are ready to proceed, Your Honor, with the understanding that if for any reason they are not here when the time comes, or we reach them, that there will be a postponement until they get here.

*Page numbering appearing at foot of page of original certified Transcript.

We can go ahead today. We can get pretty much of our case in today, I think.

The Court: I just wanted to check my calendar to see where, if I did have to continue the case, whether it would be heard at an early date, and it can, apparently.

Mr. Peterson: I might state to Your Honor the interrogatories and documents are not important in our case in chief—rebuttal only.

Mr. Sager: I don't think it is necessary to reconvene the case for the Court's consideration of the documents, when they get here. They are written documents in the file and become part of the record. The Court can consider them in chambers, unless there [4] is some question about them.

The Court: Of course, I do not think it is necessary for us to decide that matter now.

Mr. Sager: I do not want to leave the impression that they will be here tomorrow. I doubt whether they will get here that soon. Mr. Rice apparently did not get back from whatever his trip was, until this past week end, and I heard indirectly from him yesterday that he was mailing them today, so if he air mails them, they may get here.

The Court: Very well, proceed.

Mr. Peterson, I have head these pleadings, but I would be glad to have you suppliment them by a statement as to the nature of your proof, and probably Mr. Sager, also desires at this time——

Mr. Peterson: Your Honor, this action is one on an account stated. I think Your Honor decided

on that pretty well in a pre-trial discussed on the matter.

The proof will show that the defendants Lytle & Company and the Green Construction Company, applied to Hansen & Rowland, insurance agents in the City of Tacoma, for public liability and property damage insurance, insuring and protecting them, as well as some twelve or fifteen unit price contractors.

So Your Honor may be familiar with the background of the thing, the Federal Works Agency entered into a contract with C. F. Lytle Company and the Green Construction Company for the construction of a hundred and fifty-five miles of the Alaska Highway, from the Canadian border to a point in Alaska. All of this work [5] was within the territorial limits of Alaska.

By the contract, the Lytle Company not only undertook to recruit labor and perform work and labor itself, but it was also authorized to recruit a number of independent contractors experienced in highway construction, and with their equipment, and put them on the work, the Lytle-Green Company to be the supervising authority over all of the sub-contractors or unit price contractors—this twelve or fifteen, whom they recruited with their equipment, and accordingly that was done.

Then, they applied to the plaintiffs for protection and indemnity insurance,—not workmen's compensation insurance, but just public liability, in connection with their activities in this project and a policy was issued in which Lytle Company and the

Green Company as the primary contractors, and they are referred to as project managers, and will be in this proceeding, I presume, were insured, and the protection as well, extended to the sub-contractors who will probably be referred to as unit contractors. They were all named assureds. The policy was to protect all parties and the unit price contractors were named as assureds in the policy, but by the terms of the policy and the arrangement with the Underwriters, Lytle and Green were made responsible for the premiums and made responsible for the reporting of the pay rolls on which the premiums were to be computed.

Your Honor will understand that the premiums were computed on a basis of 85 cents on \$100.00 of pay roll expended on the project, and notice of cancellation and all things as between the assured and the underwriters [6] was to be done through Lytle and Green—through the Lytle Company and the Green Company, who were awaiting a sort of a partnership arrangement on this proposition, although they were both corporations, and the policy was delivered. It provided for a five thousand dollar deposit premium.

Following the delivery of the policy, which was I think delivered in July, but became effective as of June 17th—I might add there that a temporary coverage was provided prior to June 17th—the policy was delivered and accepted and received by the Lytle Company and Green Company, and I think the policy was also—the coverage certificate and policy as well. Also, copies were furnished the

Public Roads Administration, and that continued in force until the 1st of September, when the policy was cancelled by the assured giving notice in accordance with the terms of the policy.

The policy contained a provision if it was cancelled by the underwriters, the pro rata premium—that would be the earned premium, would apply, but if it were cancelled by the assured Lytle & Company and Green Company, that then it could only be cancelled on a short rate basis.

Following it up until that time, the time of the cancellation became effective, a little over a million dollars in pay roll had been incurred, a million fifty-five thousand, two hundred and fourteen dollars and two cents, to be exact.

After the delivery of the policy, the Lytle—the management, Lytle and Green Company, provided the [7] assured with a statement of the pay roll from time to time. The first statement was provided by the Public Roads Administration, so that the premium could be computed, and the result was that these—this information certified by the defendants, showed that there was a pay roll of a million and fifty-five thousand, the amount I have indicated, on which a premium of some approximate—between eight thousand five hundred and nine thousand dollars straight premium was earned, but because of the cancellation by the assured, the insurance carrier was entitled to the earned premium cancelled on a short rate basis, according to a standard formula which brought the

claim, on account of the insurance, to some \$16,000.00.

In October, I think the evidence will show, a statement was rendered to Lytle and Green Company by Hansen & Rowland for the premium with a short rate addition in the amount of \$16,153.73, and no response having been received to that, on January 25th Mr.——or the Hansen & Rowland firm addressed a letter to Mr. Harvey L. Rice, who was in charge of the matter, who had negotiated the insurance at Sioux City, Iowa, calling his attention to the fact that a statement had been rendered, a long time had elapsed, and requesting payment. That letter has been before Your Honor on the pre-trial conference, to which Mr. Rice, on behalf of the defendants, replied that he had received the letter, and after some comment stated the matter should have been paid a long time ago, and that letter has also been before Your Honor on the pre-trial conference, and we have sued. We think under [8] the law that constituted and is in fact, an account stated on which we had a right to maintain the action. I think Your Honor has ruled substantially on that proposition.

Now, I suppose at this time that the matter——

The Court: Do I understand, Mr. Peterson, there never was anything paid on account of this premium?

Mr. Peterson: Nothing was paid on account of the premiums, Your Honor, and I might add that I don't know whether it will be in evidence or not, but I think Mr. Sager will agree with me that no

loss was sustained—no public liability or property damage loss was sustained during the period on this job. Nothing was paid in that connection by the company, and it is rather significant, Your Honor, during the entire job while we were off until its completion, they were fortunate enough not to have a mishap, and there was no public liability or property damage arising out of that job. I don't know whether that is important or not, but the Court may as well be advised of the fact.

Now, nothing has been paid on account of the premium demand, but the answer, Your Honor, is a general denial, and if I understand the rule correctly, that where the transaction becomes an account stated, I think Your Honor has advanced the rule on that, on a pre-trial hearing, that it then rises to the dignity of a bill or note, and can only be impeached by—the defense to it is limited to fraud, accident or mistake in fact, and I may as well call the Court's attention to the fact at this time that there is no affirmative defense set forth in the answer. [9] Those defenses under our system of Code pleading of course must be specially pleaded by way of affirmative defense, and as the matter stands——

The Court: Does not the amended answer set forth an amended defense, Mr. Peterson?

Mr. Peterson: It sets forth an amended defense——

The Court: Liability to the extent of eight dollars and something?

Mr. Peterson: No, that is admitted in the—I don't think the affirmative defense, Your Honor, raises the issue of fraud or mistake or accident.

The Court: No, I do not think it contains either fraud or mistake.

Mr. Peterson: I think, your Honor, the rule is very well settled that those are the only defenses that may be made. If you care to have authorities on the matter—but it seems so well settled from memory, that it seems unnecessary to cite them.

The Court: Mr. Sager, I will hear from you as to your contentions in this.

Mr. Sager: I think Mr. Peterson has stated—at least the factual part of his statement has been in accordance with the facts, and I can agree with most of it.

I want to clarify some statements which may lead to some misunderstanding, and I do not think they were given by Mr. Peterson with any idea of misstating the facts at all. He refers to these contractors as—these associate contractors, as unit price contractors. Now, whether or not it is important I am not sure, but [10] the contractors other than Lytle and Green, the ones named as defendants here, were working on a cost-plus and fixed fee basis, and practically the same kind of contract as Lytle and Green. They were **not** sub-contractors in any sense of the word. Under Lytle and Green they had a direct contract with the government. They were subject to the supervision and direction of Lytle and Green. Lytle and Green were called the management contractors. It was their

duty under their contract to supervise the construction—supervise the other contractors in the construction of the highway, and to take care of the records and pay rolls and do the clerical work, and the office work, and in addition, of course, direct the other contractors, but the other contractors had separate and distinct contracts with the government, and those contracts were almost identical in terms with Lytle and Green's contracts, except for the type of work they were to do. They were all cost-plus and fixed fee contracts.

The Court: Well, were these contracts entered into directly with the government, or the Public Roads Administration?

Mr. Sager: Yes, they were.

The Court: And not with Lytle and Green?

Mr. Sager: That is correct. I do not think there is any dispute on that question.

Mr. Peterson: Under the principal contract, Your Honor, Lytle and Green Company were to negotiate these contracts with the unit price contractors and to have general—help and recruit labor, equipment, and to [11] have general supervision over them in the performance of the work, but each unit price contractor entered into a separate contract direct with the government as to his compensation, and then Lytle and Green would assign them to the various units, and these unit price contractors were all covered by the policy of insurance. They were named assureds in it.

The Court: Then, were these so-called unit contractors required under his contract with the gov-

ernment, to furnish a surety bond and public liability?

Mr. Peterson: So Your Honor may have it in mind——

Mr. Sager: I do not think there were surety bonds furnished in any of them, Your Honor, because it was a cost-plus and fixed fee contract, and the government was paying the cost on vouchers, or one way and another. I don't think their performance bond was required.

The Court: Well, was the insurance, or the premium involved here for insurance, the outgrowth of a requirement in the contract the government had made with the contractor, that he carry such insurance?

Mr. Sager: I believe that is true. If they did not require it, at least it permitted them to obtain it and authorized reimbursement for the premium.

The Court: And did these various sub-contractors have the same provision in their contract?

Mr. Sager: Whether they had it directly or indirectly——

The Court: What I have in mind is, was there a duplication of insurance? [12]

Mr. Sager: No, there is no duplication of insurance. This one policy covered all. There is no dispute between us on that.

Mr. Peterson: One policy covered all, and the provision in the principal contract is found on page 7, paragraph h, "Premium." This is the reimbursement provision:

"Premiums on such bonds and insurance policies

as the district engineer may approve or require as reasonably necessary for the protection of the government, or the project manager.”

That is the contract with Lytle and Green Company.

Now, the unit price contract—I have only one before me, but I understand they are all the same—contains this provision, page 6, paragraph 1:

“Premiums on the bond and insurance policies as the contract officer may require, and proof in writing in advance is necessary for the protection of the contractor, his employees, or the government.”

This policy, Your Honor, was, as I have stated, was obtained through bids of Lytle Company, as I understand, under the direction of the P.R.A., and the Hansen & Rowland bids being the lowest, Mr. MacDonald, whom I don't know, or his position, but I think Mr. Sager will agree that he was an authority so far as the Federal Works Administration was concerned, directed the Lytle and Green Company to obtain insurance and the insurance was obtained, and then submitted—a copy of the binder, as well as copies of the policies submitted to the P.R.A., when they [13] were delivered, and who made no objection to the same, and we will assume of course, in the absence of any objection, they were approved.

That, I think, is a statement of the situation, I think, isn't it, Mr. Sager?

Mr. Sager: Of course, I would not follow your assumption, but they were authorized, and bids

were received, and the policy was issued pursuant to the bids.

Mr. Peterson: Yes.

Mr. Sager: Yes. Now, there are two problems in this case, as it appears to me. The first is, whether or not an account has been stated, and I agree there is no affirmative defense of fraud and mistake as against their contention that is an account stated. If the Court finds and determines there is an account stated in this case by virtue of those two letters, a letter from Mr. Rice—then there is only one judgment to be entered and that is judgment for the amount they claim to be due.

It is the government's position that there is not an account stated, and while Your Honor indicated at a pre-trial conference here that you thought there was one, I want to call your attention to this, that subsequent to that hearing we filed an amended answer after obtaining leave of the Court to do so, setting up a set of circumstances and facts showing a period of negotiation between a representative of the Public Roads Administration and Mr. Northrup, who is here and will testify, and the home office of the insurer, attempting to negotiate an adjustment or settlement of this alleged premium; that [14] that period of negotiations began before this so-called account stated letter, and continued for well after, for a period well after that.

Now, I attempted at the time of the pre-trial conference to offer correspondence as showing that series of negotiations, and I believe it was Your

Honor's feeling that it was not proper at that time because of lack of proper pleading, so as a result of that we filed this amended answer in which we set up—I think it is probably set up affirmatively, this series of negotiations and conferences, leading to an adjustment of this premium, while this letter from Mr. Rice was written. It is my position, and I think the law is to that effect, that there is not an account stated except where there is a meeting of minds to a final conclusion as to the amount due, an acknowledgment—final acknowledgment that that is the amount due.

Now, obviously if they are negotiating on this thing and continuing to negotiate after the so-called letter constituting an account stated, it does not constitute a meeting of minds.

The Court: But, the negotiations were with the government or governmental agency, rather than with the party primarily liable on the insurance contract.

Mr. Sager: Yes, but we will show this and our affirmative answer pleads it, that the insurers, both the agent and Mr. Rowland, and the home office knew the type of contract under which the insured was working; that it was a cost-plus contract with the government; that all items of expense were reimbursable; that they [15] had to be approved by the government; that this agent of the P.R.A. who was negotiating on the adjustment had been recognized by both the agent here and the home office of the insurer as a representative of the government, and in that capacity also acting as the agent of the

insured, the contractors, for the purpose of negotiating this premium.

It is a fact, and the evidence will show that the original policy of insurance was not mailed to the insured—to the defendant companies, but was mailed to the Public Roads Administration. The copies of the policy were mailed to the insured. Now, that is part of the correspondence upon which I wanted to show at the time of the pre-trial conference, in other words, and the whole question of negotiation after the policy was issued. After it was cancelled, the whole negotiation was not between the insurer and the contractor, but was between Mr. Northrup, the representative of the P.R.A., and the insured—insurer, the insurance company, except for this letter that was—the sending of the statement—the bill, to Mr. Rice and the letter upon which they rely as constituting an account stated.

Well, now, so much for that. If the Court holds it is an account stated, there is nothing else to this case. If the Court holds there is not an account stated, then there is the further problem to consider. The policy fixes the premium and the rate of 85 cents per \$100.00, not upon the pay roll on the project, but upon the remuneration to employees of the insured. The insured are the contractors. The remuneration [16] of the employees of the contractors.

Now, the evidence will show that all of the men working on this job with the exception of—and there were probably twelve hundred of them during

this period of two and a half months when the policy was in force—all of them except perhaps fifteen, and those fifteen constituted the contractors themselves and in one or two instances an agent appointed by the contractor with the power of attorney where the contractor himself was not up there on the job—all other men on the job with the exception of those fifteen or so were put under Civil Service before they ever left their point of recruitment. Most of them came from Iowa and the Middle Western States. They were placed under Civil Service. They went through all the formalities of being appointed Civil Service appointees. They filled out the government forms and were finger-printed and given a medical examination, and were appointed under Civil Service, and that this entire pay roll, which was erroneously reported to the contractors as being the pay roll upon which the premium should be predicated, was the pay roll of these government employees, and they were paid by government checks, and it is the government's contention, that being under Civil Service, being paid by government checks, being directed in the details of the work by government employees—since the superintendents and the foremen and the straw bosses, every one except the actual contractor himself, were government employees—I mean, were Civil Service and paid by government check, that they were all government employees; that they were not employees of the [17] contractors, except for a few employees who were paid directly by the contractor and were re-

imbursed by the government, and I think there is no dispute between us as to the amount of that. It is some five thousand dollars. That amount we concede was pay roll remuneration of employees of the contractors, and upon that amount we recognize liability for a premium based upon that pay roll.

In addition to that the government's evidence will show that during the period involved here—the period from June 17th to September 1st or August 31st when the policy was cancelled, there were only two of these contractors who worked on the part of the road, the 155 miles of highway from Slana, Alaska, to the Canadian border, upon which this insurance contract is predicated. The insurance contract provides, and I called attention to this provision of the contract the other day, and this is not a regular part of the contract, but it is by an endorsement attached to the contract:

“It is agreed that the policy shall apply only to operations performed at, from, or in connection with all or any part or division of the construction of approximately 155 miles of highway from Slana, Alaska, to the Canadian line.”

The evidence will show that this 155 miles composed two so-called sections of the highway, sections 1 and 2, I believe they are; that—of course the highway contains many other sections—that the contract between these contractors and the government called for the construction of these two sections, 1 and 2, being approximately 155 miles

from the point Slana, Alaska, to the [18] Canadian border; that as a matter of fact, and under this insurance policy, it applies, accordingly, to this endorsement, to that portion of 155 miles.

The evidence will show that during the time, the policy covered only two of these contractors, who worked on those sections of the highway; that the rest of them were working on sections 3, I believe, and 4,—an entirely different part of the highway, not within the contract as written between the government and the contractors, and certainly not within the contract of insurance, and that if the Court does not follow us on our contention that none of these employees were employees of the contractors, but holds that they were employees upon which the premium should be based, that even so the premium should be figured only on the pay rolls of these two contractors who worked on that portion of the highway designated in the contract of insurance.

I think that is a fair statement of the government's position, Your Honor.

Mr. Peterson: I believe Your Honor has gotten away from a matter I wanted and intended to get before the Court, and I thought I would do it at this time because if the Court sustained my position counsel would have the noon hour to consider what he wishes to do. I think the only question here is whether or not under this answer the usual fraud, mistake, or accident is an issue. The burden of that—

The Court: Well, there are two very complicated problems presented in this case, and the first is this, this question of an account stated. After the pre-trial [19] hearing, where the Court has found there was an actual account stated by reason of the correspondence that passed, this amended answer was filed and the affirmative matter set up, but the answer made not on the theory they were answering to an account stated, but making an amended answer and affirmatively alleging a liability in a limited sum, but bringing in the feature that it was evidence to the Court from the very beginning existed in this case, and evidently has a number of other cases, and that is the interest of the government as a party. I still am of the impression, at least, that the government should intervene here if they want to save themselves from liability. If the government is actually a party in interest, and apparently from the statements made by counsel on both sides, they are, and want to save themselves from liability, they ought to intervene, and these people who assumed this liability, evidently on the theory that they could pass the responsibility on to the government on their cost-plus fixed fee contract, should not be permitted to hide behind that situation, but the whole facts should be made known.

Now, if this be a transaction entirely between the plaintiff here and the named defendants, I do not see that the statements made by you, Mr. Sager, would be any defense to their admitted liability.

If it is a contest for the purpose of ascertaining

whether the federal government, under its practice should be held liable, of course there is an entirely different situation presented, and then you do get into the issue as to whether the pay rolls submitted were [20] erroneously submitted by reason of carrying employees that were not on this work at all, and second, the question whether they were employees in fact, or were actually federal employees under Civil Service. The mere fact they were designated Civil Service would not have any—make them such conclusively.

Mr. Peterson: We are not proceeding—

The Court: And that is the difficulty that is presented here. I do not know why the practice—I am assuming, Mr. Sager, you are appearing in name only for these nominal defendants, and in fact, appearing for the government?

Mr. Sager: Well, you raised that question once before, Your Honor, and I am here appearing at the direction of the Attorney General for these defendants. The government is not a party to the suit, and I may say that it is my understanding that the government has to reimburse whatever amount was paid. The suit here is between two private parties.

The Court: Well, it is extremely difficult for this Court to arrive at a conclusion that it was ever intended on these cost-plus fixed fee contracts that the federal government should reimburse obligations there were fictitious or unessential or not actually required, and from the very defense that

you suggest here, you suggest a situation that falls within that general classification.

Mr. Sager: Well, there isn't any dispute that a policy of this type of insurance, or at least something very similar to it, was a proper expenditure for the [21] insured, these contractors. It is true, from the circumstances and the conditions up there, a third party public liability was practically—no hazards, no exposure to hazards. I mean, here are contractors up here in an isolated part of the world where there aren't any third parties to be injured, but presumably there may be—as a matter of fact, Mr. Peterson stated there wasn't any loss on this type of coverage from the time—not only during this period of coverage but during the period the next insurer was on. Nevertheless, there was some hazard, remote as it may be.

Now, it was a proper item of expense, proper protection for the contractors, and a proper item of expense for the government to assume, and the only question here from our standpoint is that under the terms of the policy itself, the premium is not—or the alleged premium of the insurer is not the premium charged under the terms of that policy.

The Court: I think your position would be very sound if you were before this Court as an intervenor, but the difficulty that the Court has here, is that the defendants named here, saw fit to go out and assume this liability, but that certainly should not make it of itself a federal liability.

Mr. Sager: Of course, they are suing the in-

sured, the contractor. If the Court holds he assumed this liability by virtue of this letter he wrote—holds that it is an account stated, then he is going to have to pay it, whether the government reimburses him or not, and the government is not appearing here merely to protect itself [22] from its liability under its contract, with the contractors. Perhaps it may be the administrator's office may determine this is not a reimbursable item, by reason of perhaps this letter from Mr. Rice, and if they do, it is going to be up to Lytle and Green to pay the premium without being reimbursed, subject of course to their right to sue the government for that premium as a reimbursable item, but we are not attempting merely to shield the government in this case. It is not, and the issue here is not whether the government has to reimburse Lytle and Green. The issue is whether or not under the policy this premium is the proper premium, and I think it is certainly proper to show——

The Court: Mr. Sager, I cannot conceive of the Attorney General directing you to appear in this case—and he can only direct you to appear officially,—he cannot direct you to appear as private counsel for Lytle and Green for any reason, other than for the purpose of protecting the government's interests in some way.

Mr. Sager: That is true, but that is on the assumption that the government is going to reimburse this premium.

The Court: Well, the Court is placed in a very unusual situation when the party primarily liable

assumes liability, based upon the assumption that it is a matter of little importance to them because the government in the end is going to pay it, and that appears to be the situation that we have here.

[23]

Mr. Sager: I do not know, of course, what the motive was for Mr. Rice writing this letter. I am of the opinion as I urged on Your Honor before, that the letter he writes there does not constitute a final unequivocal agreement to pay this premium. It is merely a statement of his opinion that the thing is long overdue and it should have been paid, but you recall that in the latter he says that he is taking it up, or sending some man out to Seattle to take it up with the P.R.A.

Now, obviously that throws some color on the intention of the letter.

The Court: Of course, the Court did not interpret the taking up, as you do evidently. I interpret that language to be that he was taking up the matter of making the payment, not the matter of adjusting the account.

Mr. Sager: You consider that, in the light of during this same time and during the whole time for months afterwards, the principal here, the insurance company's home office was carrying on a series of negotiations both by correspondence and in writing with the agent of the government, looking to an adjustment of this premium, and——

The Court: Well, unfortunately your pleadings do not bring those things into issue here. Your

affirmative defense does not bring that—does not make that an issue.

Mr. Sager: I think so, it alleges——

The Court: It is a mere denial. [24]

Mr. Peterson: Your Honor, we are willing to go along with the trial and if the Court directs counsel, he can amend during the noon time or any convenient time and we can go along with the case. I raised the matter so there would not be any unnecessary delay. The burden is upon him to prove any of those defenses he may elect to, and adopt. I think this action is clearly one—clearly between the plaintiff and Lytle and Green.

The Court: Unfortunately it appears that has become one of the major issues, not on the face of the pleadings, but on the face of the appearances. Lytle and Green apparently have little interest in the outcome of this case, and are apparently indifferent as to what happens.

I wish you would give consideration to the suggestion, Mr. Sager, the Court has made and if you desire to submit an amendment to your pleadings, the Court will hear you, but meantime, you may proceed with your proof and then at the noon hour you can give further consideration to this.

Mr. Peterson: Will you take the stand, please, Mr. Rowland? [25]

I. C. ROWLAND,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is I. C. Rowland? A. Yes.

Q. Mr. Rowland, what position if any do you occupy with the plaintiff, Hansen & Rowland Company? A. I am secretary.

Q. And what position did you occupy in the summer of 1942? A. The same position.

Q. What is the business of Hansen & Rowland Company? A. Insurance.

Q. You maintain offices where?

A. Seattle, Tacoma, Portland, and San Francisco, Juneau, Alaska.

Q. Hansen & Rowland Company is a corporation? A. It is.

Mr. Peterson: Your Honor, our auditor overlooked bringing in the receipts showing the payment of annual license fee.

The Court: I do not think there will be any issue on that, is there, Mr. Sager?

Mr. Peterson: We will bring them in at 2:00 o'clock. I think we have to prove it, Your Honor, in order to maintain an action.

The Court: You would not, if it was stipulated they have paid it. [26]

Mr. Sager: I do not raise any question about that. They are doing business here, I assume they paid their license fees.

(Testimony of I. C. Rowland.)

Mr. Peterson: Very well, it is so understood.

Q. Now, I will ask you whether or not you know the Phoenix Indemnity Company of New York?

A. I do.

Q. What relation did you occupy with respect to—your company with respect to that company in the summer of 1942?

A. Hansen & Rowland, Incorporated, and Hansen & Rowland, Inc. of Alaska, were their agents.

Q. Do you know if you had any business transactions with Lytle Company and Green Construction Company in 1942?

A. I did not hear the question.

Q. Did you have any business relations with the defendants C. F. Lytle Company and Green Construction Company in 1942? A. Yes.

Q. What, briefly, was that transaction?

A. We were asked to submit a written quotation for public liability and property damage insurance, including automobiles, for all work in connection with, and arising out of their contract with the United States Government for the construction of a section of the Alaska Highway, between Slana and the Canadian border, the policy to include and insure all associated or affiliated, or sub-contractors.

Q. Just a minute, was the policy issued finally in accordance with the request? A. It was.

Mr. Peterson: We will introduce that so it [27] wont be necessary to go into the other matters, unless the Court desires it.

(Testimony of I. C. Rowland.)

Mr. Sager, you have been requested to produce the bids for this insurance. I understand they are not here. It is by the order of the Court that the defendant produce them.

Mr. Sager: If he had them, and I understand he does not have them.

Mr. Peterson: They cannot be produced?

Mr. Sager: That is right. I would not say they can't be. He does not have them.

Q. Mr. Rowland, I submit to you—is that Plaintiff's Exhibit 1, it is marked up there?

The Court: Yes.

Q. 1, and ask you whether or not that is a copy of an original bid submitted by you to Lytle and Company in connection with this insurance?

A. It is.

Q. Was it delivered on or about the date indicated? A. It was delivered on that date.

Mr. Peterson: We offer the Exhibit 1 in evidence.

Mr. Sager: I object to it, Your Honor, on account of the—on the ground that the subsequent contract that was entered into, and all these preliminary negotiations leading up to it, are incorporated in the final contract. The final contract is the thing in issue here, and this is immaterial.

The Court: Objection will be overruled and exception allowed. It may be admitted. [28]

(Whereupon, bid for insurance referred to was then received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 1

June 12, 1942

C. F. Lytle Co., and Associates,
L. C. Smith Building,
Seattle, Washington.

Attention: Mr. Rice

Re: Public Liability and Property Damage Insurance.

Gentlemen:

We are pleased to quote on Public Liability and Property Damage Insurance in connection with the operations of your Company and Associates arising out of the construction of the Alaska Highway all within the territory of Alaska from Slana to the Canadian border.

Our contract will insure all operations including the operations of automobile trucks, tractors, trailers and passenger cars wheresoever operated in the Territory of Alaska, to and from and within the United States in connection with the construction of the above mentioned highway.

Limits of Liability to be \$50,000 any one person injured in any one accident, and \$100,000 for any number of persons injured in any one accident, and Property Damage of \$5,000 arising out of any one occurrence, and an aggregate limit of \$25,000 for all occurrences during the policy year. Property Damage limit on automobiles and trucks is \$5,000 any one claim or in the aggregate.

(Testimony of I. C. Rowland.)

The rate to be computed at 85c Per \$100.00 of payroll of all employees engaged in connection with the project.

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

By

I. C. ROWLAND

Secretary

ICR.1c

[In pencil]: Reinstate.

Mr. Peterson: It is stipulated and agreed between plaintiff and defendant that bids from two other underwriters were submitted with respect to furnishing this insurance coverage.

Mr. Sager: We will agree to that, Your Honor.

The Court: Very well.

Q. Mr. Rowland, I will ask you whether or not, following the submission of the bid, you received a request from Mr. Rice to furnish the insurance?

A. I did.

Q. Mr. Rowland, I will ask you whether or not Mr. Rice, in connection with his request for the insurance, gave you any information with respect to a request that he obtain the insurance?

A. At the time that he gave me the order, he told me that he had received instructions to buy it from some gentleman in Washington.

(Testimony of I. C. Rowland.)

Q. Those instructions were—in what form did the instructions come?

A. He gave me a copy of a telegram, or he showed me a copy of the telegram and we copied it.

Q. I show you now Identification No. 2, and ask you if that is the telegram you refer to?

A. Yes.

Q. Do you know who Mr. MacDonald was at that time? A. No, I don't.

Mr. Sager: I will agree this was a telegram [29] directed to Mr. Rice by Mr. MacDonald, and I don't know——

The Court: Bureau of Public Roads.

Mr. Sager: MacDonald was a man in authority of the Public——

The Court: MacDonald was the chief of the Bureau of Public Roads.

Mr. Sager: I will agree this is a copy of the telegram he sent to Mr. Rice.

Mr. Peterson: We offer it.

The Court: It will be received in evidence.

(Whereupon, telegram referred to was then received in evidence and marked Plaintiff's Exhibit No. 2.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 2

(Copy)

WESTERN UNION

June 10 1942

PM 1 34

CA 407 51 Govt-Washington DC

2 07 P

To: H L Rice

Care C F Lytle Co Sioux City Iowa—

Pending Final Information From Insurance Section of Federal Works Agency You Are Authorized to Secure Such Public Liability and Property Damage Insurance as Is Necessary to Protect the Management and Construction Contractors It Should Be Understood That These May Be Short Term Policies to Be Cancelled When Detailed Information Is Available.

MacDONALD

Mr. Peterson: Your Honor, I have just exhibited to Mr. Sager the original receipt of the Secretary of State for the current license fee of Hansen & Rowland.

Q. I will ask you when—about when this request for insurance coverage was made, Mr. Rowland?

A. You mean, when we were requested to bid on it?

Q. Yes.

A. Just a day or two, or a few days prior to the

(Testimony of I. C. Rowland.)

effective date of the insurance. I don't remember what that date was.

Q. Yes. I will ask you whether or not in the meantime you provided Mr. Rice and his companies with a temporary coverage until the policy could be prepared?

A. Yes, immediately following the receipt of the order from Mr. Rice, I prepared a regular form binder.

Mr. Peterson: We offer Plaintiff's Exhibit [30] No. 3, the binder, in evidence. That is a correct copy.

Mr. Sager: I haven't any objection.

Mr. Peterson: The Exhibit No. 3 was prepared on the date of June 17th.

Q. I will ask you whether or not it was delivered on or about that date?

A. It was delivered on that date.

(Whereupon, insurance binder form referred to was then received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 3

(Copy)

Hansen & Rowland Inc

General Agents

Tacoma - Seattle - Portland

Surety Bonds General Insurance

Tacoma, Washington

H. T. Hansen, Pres.

I. C. Rowland, Secy.

Seattle, Washington

June 17, 1942.

This Communication if Signed as Agent or Agents Shall Bind in Such Capacity Only.

Please Address All Communications to Hansen & Rowland Inc., Not to Individuals.

C. F. Lytle Company, and
Green Construction Company,
Seattle, Washington.

Re: Public Liability and Property Damage
Insurance—Alaska Road

Gentlemen:

Confirming conversation with your Mr. Rice this morning please be advised that effective from 12:01 A.M. June 17, 1942 we have bound in Phoenix Indemnity Co. of 55 Fifth Avenue, New York City, Public Liability and Property Damage insurance as follows:

(Testimony of I. C. Rowland.)

ASSURED

C. F. Lytle Company of Sioux City, Iowa,
and/or Green Construction Company and/or
Frank & Orville Eblen,
Ira Van Buskirk,
Gus Osterman,
E. M. Dusenberger, Inc.,
Sears Construction Co.,
J. W. Scothorn Construction Co.,
Frank Eblen & Hilding Ekdahl,
V. L. Lundeen, Inc.,
Wm. Horrabin Contracting Co.,
Western Engineering Co.,
L. Peterson,
Weldon Brothers,
Duvall & McKinney,
J. Leo Hoak,

and/or any other associated or affiliated contractors
who may be employed by or associated with C. F.
Lytle Company and Green Construction Company
in the performance of all or any part or division of
the construction of approximately 155 miles of
Alaska Highway from Slana to Canadian Line.

LIMITS OF INSURORS' LIABILITY:

For Public Liability for all claims arising out
of bodily injuries or death of one person from any
one accident shall be limited to \$50,000.00, and sub-
ject to that limit for each person, the Insurers'
total Liability for all claims arising out of bodily

(Testimony of I. C. Rowland.)

injuries to or the death of more than one person from any one accident is limited to \$100,000.00.

For Property Damage other than Automobile on account of any accident resulting in damage to or destruction of property of others is limited to \$5,000.00, and, subject to that limit for each accident, the Insurers' total aggregate liability on account of all accidents occurring while this insurance is in force is limited to \$25,000.00.

Property Damage—Automobiles on account of any accident resulting in damage to or destruction of property of others is limited to \$5,000.00, and subject to that limit for each accident, the Insurers' total aggregate liability on account of all accidents occurring while this insurance is in force is limited to \$25,000.00.

SCOPE OF INSURANCE:

It is understood and agreed by the Insurer that the protection given hereunder is comprehensive Public Liability and Property Damage and covers all operations of the Assureds in Alaska or elsewhere in connection with the project or having to do with the construction of said road undertaken by the Assureds including claims arising out of the operation of automobiles, trucks, tractors, trailers and all and various types of equipment.

PREMIUM:

To be computed at the rate of Eighty Five Cents (\$0.85) per each \$100.00 of payroll which payroll

(Testimony of I. C. Rowland.)

shall be declared monthly to Hansen & Rowland, Inc., of Alaska, at 201 Washington Building, Tacoma, Washington, and premium then paid computed as above.

The assureds agree to deposit as an advance premium the sum of \$5,000.00 which is to be credited or adjusted on the final payroll report under said insurance.

This binder to remain in full force and effect as evidence of said insurance until policy is delivered when liability hereunder shall terminate unless previously canceled.

Very truly yours,

PHOENIX INDEMNITY CO.

(of New York)

By HANSEN & ROWLAND, INC.
of Alaska

General Agents

By I. C. ROWLAND,
I. C. Rowland,
Secretary

ICR.1c

Q. And ask you also whether or not in this connection the copies were furnished to the Bureau of Public Roads in accordance with the policy conditions? A. They were.

Q. At the time? A. Yes.

Q. They were delivered to whom?

A. I did not personally deliver those, but they were delivered to the Seattle office of the P. R. A. in the Hoge Building.

(Testimony of I. C. Rowland.)

Q. What individual?

Mr. Sager: I object. If he did not do it himself, obviously——

Mr. Peterson: You will agree they were delivered to Mr. Rice?

Mr. Sager: I don't know about the binder.

Mr. Peterson: Mr. Miller will be here this afternoon, if there is any question about it. All right. We offer Exhibit No. 3 in evidence.

The Court: Any objection, Mr. Sager? [31]

Mr. Sager: No, that is No. 3?

Mr. Peterson: Yes, the binder.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

Mr. Peterson: Now, Your Honor, in this case we made a request for admission, among other things, an admission as to the copy of the original policy, but it is photostated, Your Honor probably discovered it in the file, and it is difficult to read. I would like to, if I may, substitute this face copy.

Mr. Sager: I haven't any objection. You will put that in as an exhibit?

Mr. Peterson: Yes. Under the admission heretofore made, pursuant to our request for admission pursuant to Court rules, we now offer Plaintiff's Exhibit No. 4, a copy of the policy delivered to the defendants.

Mr. Sager: We have no objection.

The Court: It will be admitted in evidence.

(Whereupon, copy of insurance policy referred to was then received in evidence and marked Plaintiff's Exhibit No. 4.)

FORM 4700-COMPREHENSIVE
LIABILITY POLICY-CLP

PHOENIX

No. CLP 1750

INDEMNITY COMPANY



HOME OFFICE

NEW YORK No. 558

DECLARATIONS

PLAINTIFF EXHIBIT 4

Item 1. Name of insured

See Endorsement #1

SEP 6 1942

adlan

Address Fairbanks, Alaska

(City)

Street

Town

County

(State)

Locations of all premises owned, rented or controlled by named insured All operations performed at from or in connection with the construction of approximately 155 mile Alaska Highway from Glenn, Alaska to Canadian line

Interest of named insured in such premises

Not Applicable

(Enter "Owner", "General Lessee" or "Tenant")

Part occupied by named insured

As may be necessary

The business of the named insured is

Contractors

Item 2. Policy Period: From

June 17th, 1942

to June 17th, 1943

12:01 A.M., standard time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated hereon subject to all of the terms of this policy having reference thereto.

Coverages	Limits of Liability	Advance Premiums
A—Bodily Injury Liability	\$ 50,000 each person \$100,000 each accident Not Covered aggregate products	\$
B—Automobile Property Damage Liability	\$ 5,000 each accident	\$
C—Property Damage Liability Other Than Automobile	\$ 5,000 each accident \$ 25,000 aggregate operations \$ 25,000 aggregate protective Not Covered aggregate products \$ 25,000 aggregate contractual	\$

Deposit
Total ~~Advance~~ Premium \$ 5,000.00

If Policy Period more than one year: Gross Premium \$ Discount \$ Net Premium \$

Premium is payable: On effective date of Policy \$ 1st Anniversary \$ 2d Anniversary \$

ATTACH SCHEDULES AND ENDORSEMENTS HERE

Item 4. No insurer has canceled any similar insurance issued to the named insured, nor declined to issue such insurance, during the past year, except as herein stated: Not Stated

Item 5. The schedules disclose all hazards insured hereunder known to exist at the effective date of this policy, except as herein stated: Not Applicable

Item 7. The schedules contain a complete list of all automobiles and trailers owned by the named insured at the effective date of this policy and the purposes of use thereof, except as herein stated: Not Applicable

Item 8. The schedules contain a complete list of all persons within the definition of Class 1 persons, including a designation of each such person using a non-owned trailer, at the effective date of this policy, except as herein stated: Not Applicable

Counterigned at Tacoma, Washington

this 17 day of July

1942

HANSEN & ROWLAND, INC. OF ALASKA
By S/ I.C. Rowland Secy-Treas.

Authorized Representative

PHOENIX INDEMNITY COMPANY

(A capital stock insurance company, herein called the company)

Does hereby agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and caused by accident.

Coverage B—Automobile Property Damage Liability.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage C—Property Damage Liability Other Than Automobile.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

II. Defense, Settlement, Supplementary Payments.

It is further agreed that as respects insurance afforded by this policy the company shall (a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company; (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The company agrees to pay the amounts incurred under

divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III. Definition of "Insured."

The unqualified word "insured" wherever used includes not only the named insured but also: (1) under coverages A and C, any partner, executive officer or director thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use, including loading or unloading of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining; and (2) under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The provisions of division (2) of this paragraph do not apply: (a) to any person or organization with respect to bodily injury to or sickness, disease or death of any person who is a named insured; (b) to any person or organization with respect to any trailer while used with any automobile not covered by like insurance in the company; (c) to any person or organization or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof; (d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or sickness, disease or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured; (e) with respect to any hired automobile, to the owner thereof or any employee of such owner; (f) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household; (g) to any person or organization with respect to the use of any owned automobile or hired automobile as a taxicab, public bus, or public or private livery conveyance.

IV. Policy Period, Territory.

This policy applies only to accidents which occur during the policy period within the United States of America, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during the policy period while the automobile is on a vessel between ports within said territory.

EXCLUSIONS

This policy does not apply:

- under coverages A and B, to the use of any owned automobile or hired automobile as a taxicab, public bus, public or private livery conveyance or in the business of trucking for others, or beyond the limitations of restricted use endorsement, unless notice thereof is given to the company within ten days after commencement of such use;
- under coverages A and B, to any owned automobile or hired automobile while operated (1) by any person under the minimum age required to obtain a license to operate a private passenger automobile in the state, federal district or territory, or province in which the automobile is registered or in which the accident occurs, whichever is lower, or (2) by any person under the age of fourteen years;
- under coverages A and C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) watercraft while away from premises owned, rented or controlled by the named insured, or (2) aircraft;
- to liability assumed by the insured under any contract or agreement not defined herein;

(e) under coverage A, except with respect to liability assumed under contract covered by this policy, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the business, other than domestic employment, of the insured, or to any obligation for which the insured may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of, or transported by the insured;

(g) under coverage C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining;

(h) under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to or, except with respect to the use of elevators or escalators, in the care, custody or control of the insured, or (2) any goods or products manufactured, sold, handled or distributed by the named insured or work completed by or for the named insured, out of which the accident arises.

CONDITIONS

- Premium.** The premium bases and rates for the hazards described in the declarations are stated therein. Premium bases and rates for hazards not so described are those applicable in accordance with the manuals in use by the company.

The premium reduction percentage determined in accordance with the premium reduction table forming a part of this policy, including on a pro rata basis for each owned automobile insured hereunder for less than the policy period, is applicable to the premium for each owned automobile insured hereunder.

Premium Reduction Table		
Number of Licensed Owned Automobiles, Exclusive of Trailers		Percentage Reduction
1st	5	0%
Next	15	10%
Next	30	15%
Next	50	20%
All over	100	25%
An average percentage reduction applicable to the premiums for all owned automobiles insured hereunder is to be computed in accordance with this table.		

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

When used as a premium basis: (1) the word "remuneration" shall mean the entire remuneration earned during the policy period by all employees of the named insured, other than the drivers and chauffeurs, subject with respect to each executive officer to a maximum and a minimum remuneration of \$100 and \$30 per week, and the remuneration of each proprietor at a fixed amount of \$2,000 per annum; (2) the word "receipts" shall mean the gross amount of money, including taxes, charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipt basis; (3) the word "cost" shall mean the total cost of all operations performed for the named insured during the policy period by independent contractors on each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured; (4) the word "sales" shall mean the gross amount of money, including taxes, charged for all goods and products sold or distributed by the named insured during the policy period; (5) the words "cost of hire" shall mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles; (6) the words "Class 1 persons" shall mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers of the named insured compensated for the use of such automobiles by assignment, commission, terms of employment or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured; (7) the words "Class 2 employees" shall mean all employees, including officers, of the named insured, not included in Class 1 persons.

The named insured shall maintain for each hazard

records of the information necessary for premium computation on the basis stated in the declarations and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

2. **Inspection and Audit.** The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

3. **Definitions.** (a) **Contract.** The word "contract" shall mean a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.

(b) **Automobiles.** The word "automobile" shall mean a land motor vehicle, trailer or semitrailer, provided that tractors not designed for the hauling or carrying of materials or equipment and other self-propelled contractors' equipment not designed for the carrying of persons, materials or equipment shall be deemed to be automobiles; and the word "trailer" shall include semitrailer.

"Owned automobile" shall mean an automobile owned in full or in part by the named insured.

"Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned automobile" shall mean any other automobile.

The terms of this policy shall apply separately to each automobile insured hereunder but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

(c) **Purposes of Use.** The term "pleasure and business" is defined as personal, pleasure, family and business use. The term "commercial" is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. Use of the automobile for the purposes stated includes the loading and unloading thereof.

(d) **Assault and Battery.** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

4. **Elevator Interlocks and Car Contacts.** The named insured agrees to maintain in full during the policy period such hoistway door interlocks and car gate or car door contacts or interlocks as are described in the declarations and agrees further to use due care in maintaining the efficiency of such devices during the policy period.

5. **Limits of Liability—Coverage A.** The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident, if goods or products from one prepared or acquired lot shall produce, after the named insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the named insured, bodily injury to or sickness, disease or death of more than one person, all bodily injuries, sicknesses, diseases and deaths proceeding from such common cause shall be considered as arising out of one accident.

6. **Limits of Liability—Aggregate Products—Coverages A and C.** The limit of bodily injury liability stated in the declarations as "aggregate products" is the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the named insured, or caused by operations, other than pick-up and delivery and the existence of tools, uninstalled equipment and abandoned or unused materials, when the accident occurs away from premises owned, rented or controlled by the named insured and after the named insured has relinquished possession of such goods or products to others or after the operations have been completed or abandoned at the place of occurrence of the accident. The limit of property damage liability stated in the declarations as "aggregate products" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused as aforesaid.

7. **Limits of Liability—Coverage C.** The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the handling or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by operations rated upon a cost premium basis.

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

8. **Limits of Liability.** The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

9. **Financial Responsibility Laws—Coverages A and B.** Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

10. **Notice of Accident.** Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

11. **Notice of Claim or Suit.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

12. **Assistance and Cooperation of the Insured.** The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the company shall reimburse the insured for expenses, other than loss of earnings, incurred at the company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

13. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured or after actual trial by written agreement of the insured, the claimant, and the company.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

14. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise.

15. **Subrogation.** In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

16. **Changes.** No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by a written agreement in a separate form, signed by the President of the company.

17. **Assignment.** No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Paragraph 11, any person having proper temporary custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

18. **Cancellation.** This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof

of notice and the insurance under this policy shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation.

tion becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

19. **Declarations.** By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, the Phoenix Indemnity Company has caused this policy to be signed by its President, but this policy shall not bind the company unless countersigned on the declarations page by a duly authorized representative of the company.

No. 1130
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
MAR 30 1945

PAUL P. O'BRIEN
CLERK

SPECIMEN

**PHENIX
INDEMNITY COMPANY**

NEW YORK, N. Y.

J. M. HAINES

PRESIDENT

**COMPREHENSIVE
LIABILITY POLICY**

Policy No. CLP 1750

**PHENIX
INDEMNITY COMPANY**

35 FIFTH AVENUE, NEW YORK, N. Y.



ISSUED TO

C.T. Lytle Company of Sioux

City, Iowa, etal

Expires June 17th, 1945

READ YOUR POLICY

**HANSEN & HORTLAND, INC. OF ALASKA
201 WASHINGTON BUILDING,
FAIRBANKS, WASHINGTON.**

SPECIMEN

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

PREMIUM ADJUSTMENT ENDORSEMENT

The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.

It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.

This endorsement is to take effect as of the 17th day of June, 1942 at twelve and one minute o'clock A. M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but this endorsement shall not

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)
take effect unless countersigned by a duly authorized
representative of the Company.

Countersigned:

HANSEN & ROWLAND, INC.
OF ALASKA

By S/ I. C. ROWLAND

Representative.

[Illegible]

President.

Comprehensive General Liability Policy

Endorsement

Exclusion of Products Liability

It is agreed that the policy does not apply

(1) to the handling or use of, the existence of
any condition in or a warranty of goods or products
manufactured, sold, handled or distributed by the
named insured, other than equipment rented to or
located for use of others but not sold, if the accident
occurs after the insured has relinquished possession
thereof to others and away from premises owned,
rented or controlled by the insured or on premises
for which the classification is stated in the declara-
tions as subject to this exclusion;

(2) to operations, other than pick-up and de-
livery and the existence of tools, uninstalled equip-
ment and abandoned or unused materials, if the
accident occurs after such operations have been
completed or abandoned at the place of occurrence

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

thereof and away from premises owned, rented or controlled by the insured.

This endorsement forms a part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal

Countersigned by

HANSEN & ROWLAND, INC.
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative.

[Illegible]

President.

ENDORSEMENT #1

Item 1—

Name of Insureds:

C. F. Lytle Company of Sioux City, Iowa, and/or Green Construction Company and/or Frank & Orville Eblen, Ira Van Buskirk, Gus Osterman, E. M. Dusenbergl, Inc., Sears Construction Co., J. W. Scothorn Construction Co., Frank Eblen & Hilding Endahl, V L. Lundeen, Inc., Wm. Horrabln Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duvall & McKinney, J. Leo Hoan, and/or any other associated or affiliated contractors who may be employed by or associated with C. F. Lytle Company and Green Construction Company in the performance of all or any

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska, to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

ENDORSEMENT #2

It is agreed that the Policy shall apply only to operations performed, from or in connection with

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

REVISED

ENDORSEMENT #2

It is agreed that the Policy shall apply only to operations performed at, from or in connection with all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01, standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

ENDORSEMENT #3

The undermentioned Policy is issued by the Company and accepted by the insured with the understanding and agreement that:

1. C. F. Lytle Company of Sioux City, Iowa and/or Green Construction Company shall be the principal named insureds under said Policy, and all other interests named in and covered by said Policy shall be considered as additional named insureds. For the purposes of cancellation as expressed in condition 18 of said Policy, The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall be considered as the agent of the additional named insureds, and The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall assume responsibility for the maintenance of such records as are necessary for the computation of earned premium on said Policy, and for the payment of such earned premium to the Company. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor. For the purposes of cancellation, the

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

address of the named insured shall also be Sioux City, Iowa, in addition to Fairbanks, Alaska.

2. The C. F. Lytle Company of Sioux City, Iowa and/or Green Construction Company will furnish to the Company, the name of any associated or affiliated contractor who may be employed by or associated with them in connection with the operations covered by the Policy, within 30 days after the effective date such associated or affiliated contractor undertakes operations.

3. Condition 1. Premium, in the undermentioned Policy, is eliminated and the following substituted therefor:

1. Premium. The premium stated in the Policy is an estimated premium only. Upon termination of the Policy, the earned premium shall be computed at a rate of 85% per 100 of remuneration of all named insureds. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the Company; if less, the Company shall return to the named insured the unearned portion paid by such insured.

The word "remuneration" shall mean the entire remuneration earned during the Policy period by all employees of each and every named insured, subject, with respect to each executive officer of a corporate named insured, to a maximum and a minimum remuneration of One Hundred Dollars (\$100.00) and Thirty Dollars (\$30.00) per week respectively,

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

and to the inclusion, for each individual insured or co-partner of a co-partnership insured, of a fixed amount of Two Thousand Dollars (\$2000.00) per annum. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.

4. Regardless of anything herein to the contrary it is understood and agreed that the Company waives any right of subrogation against the United States of America which might arise by reason of any payment under this Policy.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, et al but the same shall not be

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)
binding unless countersigned by a duly authorized
agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th
day of July 1942.

HANSEN & ROWLAND, INC.

OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative.

ENDORSEMENT #4

Cancellation—Cancellation by the Company shall not be effective unless a copy of the Notice of Cancellation is mailed to Insurance Section, Office of the Administrator, Federal Works Agency, Washington, D. C., and to J. S. Bright, District Engineer, Federal Works Agency, Public Roads Administration, 303 Hoge Building, Seattle, Washington, on the same day that Notice of Cancellation is mailed or delivered to the employer (named assured), and in the event of cancellation by the employer (named assured) the Company will as soon as practical mail notice thereof to the officer or officers named in this paragraph.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.

OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

Q. Mr. Rowland, I show you now Plaintiff's Exhibit No. 5, purporting to be a copy of a statement under date of July 29th, 1942, and ask you whether or not you submitted such a statement to the defendants? A. I did.

Mr. Peterson: You are unable, I understand, to produce the original at this time, Mr. Sager?

Mr. Sager: I have not been requested, Mr. Peterson, until now. [32]

(Testimony of I. C. Rowland.)

Mr. Peterson: We offer the Exhibit No. 5 in evidence, Your Honor, a statement of the deposit premium, \$5000.00.

The Court: Any objection, Mr. Sager?

Mr. Sager: No, Your Honor.

The Court: It will be admitted in evidence.

(Whereupon, statement of deposit referred to was then received in evidence and marked Plaintiff's Exhibit No. 5.)

PLAINTIFF'S EXHIBIT No. 5

Tacoma, Washington, July 29, 1942

M C. F. Lytle Company and/or Green Construction Company
Sioux City, Iowa

To HANSEN & ROWLAND, INC., Dr.
OF ALASKA

General Insurance—Surety Bonds
201 Washington Building
Tacoma, Washington
MAin 1161

Re: Phoenix Indemnity Company Policy CLP-1750
Public Liability and Property Damage insurance, for
C. F. Lytle Co. &/or Green Construction Co., et al.,
in connection with construction of approximately 155
miles of Alaska Highway from Slana, Alaska, to
Canadian border.

Bodily Injury Liability \$50,000 limit each person
\$100,000 limit each accident

Automobile Property Damage Liability
\$5,000 limit each accident

Property Damage other than Automobile
\$5,000 limit each accident
\$25,000 aggregate limit

Protective Liability \$25,000 aggregate limit

Contractual Liability \$25,000 aggregate limit

Based on rate of 85c per each \$100.00 per of payroll.

Deposit Premium \$5,000.00

(Testimony of I. C. Rowland.)

This is to Certify:

(1) That the amount stated herein is a correct premium charge for the insurance afforded by the policy.

(2) That the computation is based upon a period not in excess of the time elapsed between the date of the commencement of work and the date of the completion thereof.

(3) That only the payrolls for the work done under the contractor's obligation to the Government have been considered in the computation of the premium.

(4) That the premium covers no insurance extending to any operation or location not a part of the work performed by the contractor under his contract with the Government in connection with the construction of Alaska Highway from Slana, Alaska, to the Canadian Border.

The above bill is correct and just; and payment therefore has not been received.

HANSEN & ROWLAND INC., OF ALASKA
General Agents

By I. C. ROWLAND
I. C. Rowland, Secretary-Treasurer

Q. I show you now Plaintiff's Exhibit No. 6, Mr. Rowland, and ask you from whom that was received by your office?

A. This was received from Lytle and Green's Alaska office.

Q. And what date does it bear?

A. Dated August 22nd, 1942.

Q. I will ask you if that was in connection with this policy of insurance which has just been introduced in evidence? A. It was.

Mr. Peterson: We offer Exhibit No. 6 in evidence.

The Court: Any objection?

(Testimony of I. C. Rowland.)

Mr. Peterson: It is admitted, I think, Your Honor, under the admissions.

The Court: It will be admitted in evidence.

Mr. Sager: What is the date of that?

Mr. Peterson: What is the date, please—August the 22nd.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 6.) [33]

PLAINTIFF'S EXHIBIT NO. 6

C. F. LYTLE COMPANY and
GREEN CONSTRUCTION CO.

Offices: Slana, Alaska; Seattle, Washington; Des Moines, Iowa; Sioux City, Iowa.

Reply by air mail to: C. F. Lytle Company and Green Construction Co., contractors Alaska highway, Fairbanks, Alaska, P.O. Box 898.

Slana, Alaska.

Gulkana, Alaska,

August 22, 1942.

Hansen & Rowland, Inc.,

Tacoma, Washington.

Attn. of Mr. I. C. Rowland:

Dear Sir:

Enclosed herewith are copies of statements of expenditures of wages covering payrolls up through July 31, inclusive, with attached schedules showing voucher number references that will enable your auditor to audit these figures, should you find it

(Testimony of I. C. Rowland.)

necessary. This statement of expenditures of wages does not include employees in the Lytle & Green office at Seattle, Washington, and it will be necessary for your agents in Seattle to secure these figures.

You have not acknowledged receipt of my letter dated August 6th, in which I recommended that your Seattle agents contact Mr. Peterson, our branch office manager, in the Smith Tower, to secure the necessary figures on payrolls from June 17th through July 15th, inclusive. Since these disbursements were made in Seattle, I am of the opinion that the statement of expenditure of wages would be easier to compile there than here in Alaska, since we still have not received copies of the payrolls that were prepared and paid in Seattle.

I will continue to make statement of expenditure of wages on all payrolls that are prepared and disbursed here in Alaska.

Hoping this meets with your approval, I remain

Very truly yours,

C. F. LYTLE and

GREEN CONSTRUCTION CO.

GEORGE ROACH,

Asst. Office Manager.

GR:ej

enc.

June 17—(In pencil)

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 6—(Continued)

STATEMENT OF EXPENDITURE OF WAGES

Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
1.	William Horrabin Contracting Co.	7-16 to 7-31 Inc.	\$ 12,201.72	\$ 1,000.50	\$ 11,201.22
2.	Frank Ehlen & Orville Ehlen	7-16 to 7-31 Inc.	15,198.34	1,692.00	13,506.34
3.	Duval and McKinney	7-16 to 7-31 Inc.	21,463.05	2,232.00	19,231.05
4.	J. Leo Hoak	7-16 to 7-31 Inc.	31,144.64	3,543.00	27,601.64
5.	Ira Van Buskirk	7-16 to 7-31 Inc.	14,199.41	1,632.00	12,567.41
6.	J. W. Scothorn Construction Co.	7-16 to 7-31 Inc.	13,778.74	1,560.00	12,218.74
7.	L. Peterson	7-16 to 7-31 Inc.	11,985.60	1,296.00	10,689.60
8.	Western Engineering Company	7-16 to 7-31 Inc.	18,903.55	2,028.00	16,875.55
9.	E. M. Duesenberg, Inc.	7-16 to 7-31 Inc.	27,047.91	3,120.00	23,927.91
10.	Sears Construction Co.	7-16 to 7-31 Inc.	13,456.55	1,536.00	11,920.55
11.	Gus Osterman	7-16 to 7-31 Inc.	14,314.35	1,545.00	12,769.35
12.	L. Peterson	8-1 to 8-15 Inc.	146.68	21.00	125.68
13.	Welden Brothers	7-16 to 7-31 Inc.	20,298.37	2,160.00	18,138.37
14.	V. L. Lundeen, Inc.	7-16 to 7-31 Inc.	12,321.23	1,368.00	10,953.23
15.	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	12,281.53	2,049.50	10,232.03
16.	Frank Ehlen & Hilding Ekdahl	7-16 to 7-31 Inc.	11,942.79	1,329.00	10,613.79
17.	Western Engineering Co.	8-1 to 8-15 Inc.	158.48	22.50	135.98
Totals:				\$28,134.50	\$222,708.44

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 6—(Continued)

Hansen & Rowland, Inc., of Alaska
201 Washington Building
Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company
Green Construction Co.

and/or	\$ 12,281.53*	\$	4.895
Frank & Orville Eblen	15,198.34		6.059
Ira Van Buskirk	14,199.41		5.661
Gus Osterman	14,314.35		5.707
E. M. Dusenbergh, Inc.,	27,047.91		10.783
Sears Construction Co.	13,456.55		5.365
J. W. Shothorn Construction	13,778.74		5.493
Frank Eblen & Hilding Ekdahl	11,942.79		4.762
V. L. Lundeen, Inc.	12,321.23		4.912
Wm. Harrabin Contracting Co.	12,201.72		4.864
Western Engineering Co.	18,903.55	158.48**	7.599
L. Peterson	11,985.60	146.68**	4.837
Weldon Brothers	20,298.37		8.092
Duvall & McKinney	21,463.05		8.556
J. Leo Hoak	31,144.64		12.416
Others (List below)			100.000
	\$250,537.78	\$305.16	
	305.16		
Gross payrolls paid in Alaska:	\$250,842.94		

* Does not include payroll covering employees in Lytle & Green office at Seattle, Washington.

** Discharge Payroll Period 8-1-42 to 8-15-42 inclusive.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 6—(Continued)

Payroll Period 7-16-42 to 7-31-42.

Total Remuneration	\$250,842.94
Rate .85c	<hr/>
Earned Premium	\$ 2,132.16

C. F. LYTLE COMPANY &/or
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Title Asst. Office Manager.

Mr. Peterson: I ask the Court to look at the second page of that, particularly, and call the Court's attention to the fact that the premium was computed by the defendants—the earned premium.

Q. Mr. Rowland, I show you now Plaintiff's Exhibit No. 7 and ask you when that came into your possession?

A. When it came into my possession?

Q. Yes. A. Shortly after.

Q. Or your office?

A. Shortly after, August 31st.

Q. That is the date it bears?

A. It is dated August 31st.

Q. And that was received through the—how was that received?

A. It was received through the mail from Alaska.

Q. I will ask you whether or not that was in

(Testimony of I. C. Rowland.)

connection with this policy of insurance which has been introduced in evidence?

A. Yes, it was.

Mr. Peterson: We offer Exhibit No. 7 in evidence?

Mr. Sager: What is that?

Mr. Peterson: That is a periodical—what is the date of that, 31st of August—periodical statement covering one of the periods.

The Court: Any objection, Mr. Sager?

Mr. Sager: No, I think it has been admitted in the request for admissions.

The Court: It may be admitted.

(Whereupon, document referred [34] to was then received in evidence and marked Plaintiff's Exhibit No. 7.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 7

C. F. LYTLE COMPANY and
GREEN CONSTRUCTION CO.

Gulkana, Alaska

Mail Address: P. O. Box 989, Fairbanks, Alaska

Offices: Slana, Alaska; Seattle, Washington; Des

Moines, Iowa; Sioux City, Iowa.

August 31st, 1942

Mr. I. C. Rowland

Hansen & Rowland, Inc.

General Agents,

Tacoma, Washington.

Dear Sir:

Re: Phoenix Indemnity Company Policy No.
CLP 1750.

Attached herewith is "Statement of Expenditure of Wages" No. 2 covering payroll checks that were issued and disbursed by the Public Roads Administration for the period August 1st, 1942 to August 15th, 1942 inclusive.

I have never received your acknowledgment of receipt of Statement No. 1 and whether or not it was filled out to your satisfaction. Also, have you been able to secure the necessary figures on payrolls

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 7—(Continued)

issued by the Public Roads Administration in Seattle, Washington?

Very truly yours,

C. F. LYTLE COMPANY &
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Asst. Office Mgr.

GR/gr

Hansen & Rowland, Inc., of Alaska
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

STATEMENT OF EXPENDITURE OF WAGES No. 2

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company			
Green Construction Co.	\$ 200.00	\$ 26.66**	
and/or	11,391.13	* 1,124.20***	5.296
Frank & Orville Eblen	13,960.11		5.803
Ira Van Buskirk	13,243.81		5.505
Gus Osterman	13,683.66		5.688
E. M. Dusenbergl, Inc.,	26,094.23		10.847
Sears Construction Co.	12,692.37		5.276
J. W. Shothorn Construction	13,103.45		5.447
Frank Eblen & Hilding Ekdahl	11,993.34		4.985
V. L. Lundeen, Inc.	11,636.76		4.837
Wm. Harrabin Contracting Co.	13,651.18		5.674
Western Engineering Co.	17,156.23		7.131
L. Peterson	11,111.40		4.619

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 6—(Continued)

Weldon Brothers	18,562.22		7.716
Duvall & McKinney	20,395.35		8.478
J. Leo Hoak	30,547.78		12.698
Others (List below)			100.000
	\$239,423.02	\$1,150.86	
	1,150.86		
Gross payrolls this period:	\$240,573.88		

* Does not include payroll for employees in Lytle & Green office, Seattle, Washington.

** Discharge payroll for period 8-16-42 to 8-17-42 inclusive.

*** Supplementary payroll for period 7-16-42 to 7-31-42 inclusive.

Payroll Period 8-1-42 to 8-15-42.

Previous total	\$250,842.94
Total this period	240,573.88
Total this period	240,573.88
	.85
Premium to date	\$ 4,177.04
Less previous premium	2,132.16
Premium this period	\$ 2,044.88
Total Remuneration	\$240,573.88
Rate .85c	
Earned Premium	\$ 2,044.88

C. F. LYTLE COMPANY &/or
GREEN CONSTRUCTION CO.
By GEORGE ROACH
Title Asst. Office Manager.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 7—(Continued)

STATEMENT OF EXPENDITURE OF WAGES No. 2

Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
	Totals f'wd. from last Statement		\$250,842.94	\$ 28,134.50	\$222,708.44
18	C. F. Lytle Co. & Green Constr. Co.	8-1 to 8-15 Inc.	11,391.13	1,890.00	9,501.13
19	V. L. Lundeen, Inc.	8-1 to 8-15 Inc.	11,636.76	1,282.50	10,354.26
20	William Horrabin Contracting Co.	8-1 to 8-15 Inc.	13,651.18	1,485.00	12,166.18
21	J. W. Seothorn Construction Co.	8-1 to 8-15 Inc.	13,103.45	1,459.50	11,643.95
22	L. Peterson	8-1 to 8-15 Inc.	11,111.40	1,203.00	9,908.40
23	Sears Construction Co.	8-1 to 8-15 Inc.	12,692.37	1,440.00	11,252.37
24	Ira Van Buskirk	8-1 to 8-15 Inc.	13,243.81	1,507.50	11,736.31
25	Frank Eblen & Orville Eblen	8-1 to 8-15 Inc.	13,960.11	1,560.00	12,400.11
26	Gus Osterman	8-1 to 8-15 Inc.	13,683.66	1,462.50	12,221.16
27	Welden Brothers	8-1 to 8-15 Inc.	18,562.22	1,947.00	16,615.22
28	Frank Eblen & Hilding Ekdahl	8-1 to 8-15 Inc.	11,993.34	1,288.50	10,704.84
29	E. M. Duesenberg, Inc.	8-1 to 8-15 Inc.	26,094.23	2,917.50	23,176.73
30	Duvall & McKinney	8-1 to 8-15 Inc.	20,395.35	2,092.50	18,302.85
31	Western Engineering Co.	8-1 to 8-15 Inc.	17,156.23	1,852.50	15,303.73
32	J. Leo Hoak	8-1 to 8-15 Inc.	30,547.78	3,601.50	26,946.28
33	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-17 Inc.	26.66	6.00	20.66
34	C. F. Lytle Co. & Green Constr. Co.	8-1 to 8-15 Inc.	200.00	45.00	155.00
35	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	1,124.20	111.00	1,013.20
Total to Date:			\$491,416.82	\$ 55,286.00	\$436,130.82

(Testimony of I. C. Rowland.)

Mr. Peterson: I think all of these have, Your Honor, but I just wanted to show receipt.

Q. I show you now Plaintiff's Exhibit No. 8, and ask you how that came into your possession?

A. It came in through the mail.

Q. Direct your attention to the date and ask you what date?

A. It was mailed in Seattle, Washington, on September 23rd, 1942.

Q. I will ask you whether that was in connection with this insurance policy? A. It was.

Mr. Peterson: We offer Exhibit No. 8 in evidence, if the Court please.

Mr. Sager: I have no objection.

The Court: It may be admitted.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 8.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT NO. 8

C. F. LYTLE COMPANY and
GREEN CONSTRUCTION CO.

Offices: Slana, Alaska; Seattle, Washington; Des
Moines, Iowa; Sioux City, Iowa.

Seattle, Wash.,
September 23, 1942

Hansen & Rowland, Inc.
Tacoma
Washington

Attention: Mr. Tinius

Gentlemen:

We enclose herewith Payroll Audit from June 17
to August 31 on the Seattle Branch Office.

Mr. Bradshaw and Mr. Coykendall are shown
as paid at two rates. This is due to the fact that
the Public Roads Administration approved their
salaries at \$750 per month and the contractor is
paying them \$250 per month out of his fee.

Very truly yours,

C. F. LYTLE COMPANY and
GREEN CONSTRUCTION CO.

Alaska Highway Division
E. C. PETERSON,
E. C. Peterson,
Branch Manager

ecp:mh

enc:

cc: Mr. W. E. Corbin

(Testimony of I. C. Rowland.)

Employees paid direct by the Public Roads Administration. C. F. Lytle Company & Green Construction Co. Contract # WA4PR-14299

Paid to 8/31/42

Margaret L. Herman—\$1620.00 annual pay.....	\$337.50
Marie Vander Meyden—\$1800.00 annual pay.....	375.00
Elwin C. Peterson—\$400.00 monthly pay.....	1,200.00

 \$1,912.50

Employees paid by C. F. Lytle Company and Green Construction Co. and reimbursed by the Public Roads Administration

Valerie Gardiner—

2½ days in June @ \$120.00 per mo. \$ 10.00

J. J. McDonnell—

7 days in June @ \$325.00 per mo. 88.40

E. L. Bradshaw—

May—4 days @ \$25.00 per day	100.00	} **out
*May—4 days @ \$7.25 per day	29.00	

June—30 days @ \$25.00 per day	750.00	} **19 days out	
			475
			158.33

*June—30 days @ \$8.33⅓ per day	250.00	}	633.33
July—30 days @ \$25.00 per day	750.00		

*July—30 days @ \$8.33⅓ per day	250.00
---------------------------------	--------

August—12 days @ \$25.00 per day	300.00
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*August—12 days @ \$8.33⅓ per day	100.00
-----------------------------------	--------

Claude Coykendall—

June—23 days @ \$25.00 per day	575	} **12 days out	
			300.00
			100.00

*June—23 days @ \$8.33⅓ per day	191.67	}	400.00
July—30 days @ \$25.00 per day	750.00		

*July—30 days @ \$8.33⅓ per day	250.00
---------------------------------	--------

August—30 days @ \$25.00 per day	750.00
----------------------------------	--------

*August—30 days @ \$8.33⅓ per day	250.00
-----------------------------------	--------

(Testimony of I. C. Rowland.)

Henry L. Convey—

July—18 days @ \$316.66 per month 190.00

August—30 days @ \$316.66 per month 316.66

\$5,900.73

* Contractors Expense and not reimbursable.

** Marginal notations in pencil.

[Stamped]: Received Sep 24, 1942. Hansen & Rowland, Inc., Tacoma, Washington.

[Notation in pencil]:

1912.50

5900.73

7813.23

— 1162.33

6650.90

The Court: You may proceed, Mr. Peterson.

Mr. Peterson: Plaintiff offers Plaintiff's Exhibit No. 9 in evidence. It is a similar certificate. It is for the pay roll period from 7-16-42 to 7-31-42. There is no letter attached to it.

Q. I show you now Exhibit No. 9, Mr. Rowland, and ask you how that came into your possession?

A. It came through the mail.

Q. From whom was it?

A. From Lytle and Green in Alaska. [35]

Q. I will ask you whether or not that was in connection with this insurance policy?

A. It was.

Mr. Peterson: We offer Exhibit No. 9 in evidence.

(Testimony of I. C. Rowland.)

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, certificate referred to was then received in evidence and marked Plaintiff's Exhibit No. 9.)

PLAINTIFF'S EXHIBIT NO. 9

Hansen & Rowland, Inc., of Alaska
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company

Green Construction Co.

and/or	\$ 12,281.53*	\$
Frank & Orville Eblen	15,198.34	
Ira Van Buskirk	14,199.41	
Gus Osterman	14,314.35	
E. M. Dusenbergl, Inc.	27,047.91	
Sears Construction Co.	13,456.55	
J. W. Shothorn Construction	13,778.74	
Frank Eblen & Hilding Ekdahl	11,942.79	
V. L. Lundeen, Inc.	12,321.23	
Wm. Harrabin Contracting Co.	12,201.72	
Western Engineering Co.	18,903.55	158.48**
L. Peterson	11,985.60	146.68**
Weldon Brothers	29,298.37	
Duwall & McKinney	21,463.05	
J. Leo Hoak	31,144.64	

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 9—(Continued)

Others (List below)

\$250,537.78	\$305.16
305.16	

Gross payrolls paid in Alaska.....	\$250,842.94
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* Does not include payroll covering employees in Lytle & Green office at Seattle, Washington.

** Discharge Payroll Period 8-1-42 to 8-15-42 inclusive.

Payroll Period 7-16-42 to 7-31-42.

Total Remuneration	\$250,842.94
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Rate .85e	
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Earned Premium	\$ 2,132.16
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C. F. LYTLE COMPANY &/or
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Title Asst. Office Manager

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 9—(Continued)
STATEMENT OF EXPENDITURE OF WAGES

Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
1.	William Horrabin Contracting Co.	7-16 to 7-31 Inc.	\$ 12,201.72	\$ 1,000.50	\$ 11,201.22
2.	Frank Eblen & Orville Eblen	7-16 to 7-31 Inc.	15,198.34	1,692.00	13,506.34
3.	Duvall and McKinney	7-16 to 7-31 Inc.	21,463.05	2,232.00	19,231.05
4.	J. Leo Hoak	7-16 to 7-31 Inc.	31,144.64	3,543.00	27,601.64
5.	Ira Van Buskirk	7-16 to 7-31 Inc.	14,199.41	1,632.00	12,567.41
6.	J. W. Seothorn Construction Co.	7-16 to 7-31 Inc.	13,778.74	1,560.00	12,218.74
7.	L. Peterson	7-16 to 7-31 Inc.	11,985.60	1,296.00	10,689.60
8.	Western Engineering Company	7-16 to 7-31 Inc.	18,903.55	2,028.00	16,875.55
9.	E. M. Duesenberg, Inc.	7-16 to 7-31 Inc.	27,047.91	3,120.00	23,927.91
10.	Sears Construction Co.	7-16 to 7-31 Inc.	13,456.55	1,536.00	11,920.55
11.	Gus Osterman	7-16 to 7-31 Inc.	14,314.35	1,545.00	12,769.35
12.	L. Peterson	8- 1 to 8-15 Inc.	146.68	21.00	125.68
13.	Weldon Brothers	7-16 to 7-31 Inc.	20,298.37	2,160.00	18,138.37
14.	V. L. Lundeen, Inc.	7-16 to 7-31 Inc.	12,321.23	1,368.00	10,953.23
15.	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	12,281.53	2,049.50	10,232.03
16.	Frank Eblen & Hilding Ekdahl	7-16 to 7-31 Inc.	11,942.79	1,329.00	10,613.79
17.	Western Engineering Co.	8- 1 to 8-15 Inc.	158.48	22.50	135.98
Totals:				\$28,134.50	\$222,708.44

(Testimony of I. C. Rowland.)

Q. Mr. Rowland, I will ask you whether or not your office received reports of the pay rolls from the defendants for the period prior to these certificates which we have identified and put in evidence, for the first period of the work, did you receive a certificate? A. Yes, we did.

Q. In what form was that?

A. We received a report of the employees that were engaged on all this work, for the P.R.A.

Q. Who prepared that, do you know where it originated from?

A. Well, I could only testify I assume it was prepared up there at Alaska.

Q. I will ask you if you made a request for a report of the pay roll for the first period?

A. Yes, we did.

Q. And who did you make that to?

A. With the assured, Lytle and Green.

Q. Where? A. In Seattle.

Q. To whom did you make that, yourself? [36]

A. I made several of them, and Mr. Miller made several of them.

Q. The one you made, who did you make it to?

A. To their manager in the Seattle office.

Q. What is his name?

A. I don't recall his name now. He was in the Smith Tower.

Q. What information did he give you regarding obtaining that?

A. He told me that we could get it from the P. R. A. office in the Hoge Building, Seattle.

(Testimony of I. C. Rowland.)

Q. The P. R. A. is the Public Roads Administration? A. Yes, it is.

Q. And who obtained—did you obtain this personally, or Mr. —

A. No, I did not obtain it personally.

Q. Well, I will put him on the stand. Now, Mr. Rowland, I will ask you whether or not along about September 1st, 1942, you received notices of cancellation of this policy? A. Yes, we did.

Q. Of insurance, and I show you now Plaintiff's Exhibit No. 11, and ask you from whom you received the exhibit?

A. Public Roads Administration of the Federal Works Agency.

Q. And were the various cancellations attached?

A. Yes.

Mr. Peterson: We offer in evidence Plaintiff's Exhibit No. 11. With the permission of the Court, and by agreement of counsel, Your Honor, I wish to detach part of Exhibit No. 11. I find that I had not noticed it before, a part of it is not material to the case and has nothing to do with it. [37]

The Court: What is Exhibit No. 11, correspondence?

Mr. Peterson: It is correspondence that has no relation to this matter.

The Court: But, that part that is relevant is likewise correspondence?

Mr. Peterson: No, this part that I am offering is the original cancellations, Your Honor, and a

(Testimony of I. C. Rowland.)

letter enclosing them; that the Green Construction Company and the named unit price contractors cancelled all in writing effective September 1st, '42.

Mr. Sager: That is true, I never knew. I am willing to agree, however.

Mr. Peterson: Stipulate that the various unit price contractors cancelled, along with the Lytle and Green——

Mr. Sager: Yes, as of August 31st.

Mr. Peterson: I desire to withdraw this exhibit, No. 11. It has not been offered yet, Your Honor.

The Court: Very well.

Q. I will show you, Mr. Rowland, a paper which purports to be an invoice dated October 6th, 1942. I will ask you whether or not that was mailed or delivered to the addressee, or Lytle, the defendant?

A. Mailed to Lytle and Green at Souix City, Iowa.

The Court: What number is that?

A. 12.

The Clerk: 12.

Mr. Peterson: That I think is covered under [38] the request for admissions, Mr. Sager, is it not?

Mr. Sager: I don't recall. I haven't any objection.

Q. Mailed by your office? A. Yes.

Q. With the postage prepaid on it?

A. Yes.

Mr. Peterson: We offer Exhibit No. 12 in evidence.

(Testimony of I. C. Rowland.)

Mr. Sager: I have no objection.

The Court: It will be admitted in evidence.

(Whereupon, invoice referred to was then received in evidence and marked Plaintiff's Exhibit No. 12.)

PLAINTIFF'S EXHIBIT No. 12

(Copy)

Tacoma, Oct. 6, 1942

M C. F. Lytle & Green Construction Co.

Sioux City, Iowa

To HANSEN & ROWLAND, INC., Dr.

General Insurance—Surety Bonds

13th Floor Puget Sound Bank Building

Tacoma, Washington

MAin 1161

Policy CLP-1750—Comprehensive Liability

Phoenix Indemnity Company

Audit period June 17, 1942 to August 31, 1942

Payroll for C. F. Lytle and/or Green Construction

Company and/or Frank & Orville Eblen, Ira Van

Buskirk, Gus Osterman, E. M. Dusenber, Inc.,

Sears Construction Co., J. W. Shothorn Construc-

tion Co., Frank Eblen & Hilding Ekdahl, V. L.

Lundeen, Inc., Wm. Horrabin Contracting Co.,

Western Engineering Co., L. Peterson, Weldon

Brothers, Duvall & McKinney, J. Leo Hoak:

(~~1,055,214.02~~)

Total Payroll \$309,821.42 @ .85 M

1.801 short rate cancellation factor \$16,153.73

This is to Certify:

(1) That the amount stated herein is a correct premium charge for the insurance afforded by the policy.

(2) That the computation is based upon a period not in excess of the time elapsed between the date of the commencement of work and the date of completion thereof.

(3) That only the payrolls for the work done under the contractor's obligation to the government have been considered in the computation of the premium.

(Testimony of I. C. Rowland.)

(4) That the premium covers no insurance extending to any operation or location not a part of the work performed by the contractor under his contract with the government in connection with the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to the Canadian line.

The above bill is correct and just; and payment therefore has not been received.

HANSEN & ROWLAND, INC., OF ALASKA
General Agents

By I. C. ROWLAND,
Secretary-Treasurer

Q. Mr. Rowland, I show you Plaintiff's Exhibit No. 13, purporting to be a letter addressed to the defendants at Souix City, Iowa. I ask you if that letter was written and mailed by—written by you—that is, dictated? A. It was.

Q. And when was it mailed?

A. On January the 25th, 1943.

Q. In the usual course? A. Yes.

Q. Mr. Rowland, I show you Plaintiff's Exhibit No. 14, will you please tell the Court how that came into your possession?

Mr. Peterson: Did I offer 13?

The Court: No, you have not.

Mr. Sager: I haven't any objection to it.

Mr. Peterson: The plaintiff offers Exhibit [39]
No. 13.

The Court: It will be admitted.

(Whereupon, document referred to was then received in evidence, and marked Plaintiff's Exhibit No. 13.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 13

H. T. Hansen, Pres.

I. C. Rowland, Secy.

Hansen & Rowland, Inc.

General Agents

Surety Bonds - General Insurance

Tacoma, Seattle, Portland

Tacoma, Washington

January 25, 1943

This communication if signed as agent or agents shall bind in such capacity only. Please address all communications to Hansen & Rowland, Inc., not to individuals.

Messrs. C. F. Lytle and Green Construction Co.,
Sioux City, Iowa.

Attention: Mr. Harvey Rice.

Gentlemen:

Re: Policy CPL-1750—Comprehensive Liability, Phoenix Indemnity Company—Alcan Highway

On October 7, 1942, we wrote you enclosing our invoice for \$16,153.73, being the earned premium in accordance with policy conditions for the above policy, which was cancelled at your request.

We have not yet been favored with remittance and feel that sufficient time has elapsed and we must now request that payment be made. We trust

(Testimony of I. C. Rowland.)

that you will let us have your check by early mail.

Yours very truly,

HANSEN & ROWLAND INC.

of Alaska,

General Agents.

I. C. ROWLAND,

Secretary.

ICR:ft

Q. Your attention was directed to Exhibit No. 14. Will you please tell the Court how that came into your possession, Mr. Rowland?

A. It came through the mail and was received by us on February 1st, 1943.

Q. And do you know Mr. H. L. Rice?

A. Yes.

Q. Whose name is signed to it? A. Yes.

Q. What is his position with the defendants, or was, at that time?

A. He was called business manager.

Q. I will ask you whether or not Mr. Rice was the gentleman with whom you had your negotiations looking towards the providing of the insurance?

A. Yes.

Mr. Peterson: We offer Exhibit No. 14.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 14.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 14

Real Estate, Store Leases, Industrial Sites.
Insurance, Fire and Casualty, Surety Bonds.

C. F. Lytle Company

Incorporated

505 Nebraska Street

Sioux City, Iowa

January 30, 1943.

Mr. I. C. Rowland, Secretary

Hansen & Rowland Inc.

Tacoma, Washington.

Dear Mr. Rowland:

This will acknowledge receipt of your letter of January 25th in regard to the unpaid premium on the comprehensive liability policy written for Lytle & Green.

Mr. Peterson of the Lytle & Green, Seattle office is here at this time and expects to return to Seattle next week. I am asking him to take this up immediately, with the P. R. A. office and try to get the matter disposed of without further delay. It should have been paid long ago and we regret that it has not been properly taken care of.

Very truly yours,

C. F. LYTLE COMPANY

By H. L. RICE

H. L. Rice

HLR/hs

CC/Hansen & Rowland, Inc.

Dexter-Horton Bldg.,

Seattle, Washington.

(Testimony of I. C. Rowland.)

Mr. Peterson: We offer Exhibit 14 in evidence.

The Court: It is admitted.

Q. Mr. Rowland, I show you Identification No. 15 and ask you [40] from whom you received that?

A. From the home office of the Phoenix Indemnity Company.

Q. That is an assignment of this claim?

A. Yes, it is an assignment of the claim to Hansen & Rowland, Inc.

Mr. Peterson: We offer Exhibit No. 15 in evidence if the Court please.

Mr. Sager: No objection.

The Court: It will be admitted.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 15.)

PLAINTIFF'S EXHIBIT No. 15

ASSIGNMENT

Know All Men By These Presents: That Phoenix Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business in the State of Washington, does hereby sell, assign, transfer and set over unto Hansen & Rowland, Inc., a corporation of Tacoma, Washington, all claims and demands that it may have against C. F. Lytle Company of Sioux City, Iowa, and Green Construction Company of Des Moines, and Frank and Orville Ehlen, Ira Van Buskirk, Gus Osterman, E. M. Duesenberg, Inc., Sears Construction Co.,

(Testimony of I. C. Rowland.)

J. W. Scothorn Construction Co., Frank Eblen and Hilding Ekdahl, V. L. Lundeen, Inc., Wm. Horrabin Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duval & McKinney and J. Leo Hoak, and each of them, on account of premiums accruing under that certain policy of insurance No. CLP-1750 and endorsements and extensions thereof issued by the undersigned to said persons above named on or about the 17th day of June, 1942, hereby giving and granting unto said Hansen & Rowland, Inc., full power and authority in the name of the undersigned or otherwise to demand, sue for, collect and receive said demands or any part thereof, and to release, discharge or satisfy the same as effectually and to all intents and purposes as the undersigned might or could do.

In Witness Whereof Phoenix Indemnity Company has caused these presents to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed.

Dated July 9th, 1943.

[Seal]

PHOENIX INDEMNITY
COMPANY,

By JAMES MURRAY HAINES
President.

Attest:

J. F. CUNNINGHAM
Secretary.

(Testimony of I. C. Rowland.)

State of New York

County of New York—ss.

On the 26th day of July in the year of 1943, before me personally came James Murray Haines, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan in the City of New York; that he is the president of the Phoenix Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of the said corporation, and that he signed his name thereto by like order.

HOWARD M. BORST

Howard M. Borst,

Notary Public, Queens Co. Clks. No. 187, Reg. No. 229-B-5 Cert. filed N. Y. Co. Clks. No. 867, Reg. No. 501-B-5 Commission Expires March 30, 1945.

Mr. Peterson: You may cross-examine.

Cross Examination

By Mr. Sager:

Q. Mr. Rowland, you know Mr. H. R. Northrup?
A. Yes.

Q. Do you know what his—do you know who he is with, or what his position is?

A I don't know or recall what his title is. He is with the P. R. A., Public Roads Administration.

(Testimony of I. C. Rowland.)

Q. When did you become acquainted with him?

A. Some time in 1942, the latter part.

Q. Where did you first see him?

A. First met him in Seattle.

Q. That was in connection with this policy of insurance?

A. No, it was not.

Q. What was the purpose of that meeting?

A. It was in connection with the Okes Construction Company [41] compensation contract, which contractors were located at St. Paul and had a contract on the Alaska Highway between Fort St. John and Fort Nelson, and from whom we had received an order to write compensation insurance, and the discussions had with Mr. Northrup at that time were relative to the rate and the underwriting plan in that particular contract.

Q. That Okes Construction contract was public compensation——

Mr. Peterson: I think this is not proper cross-examination, Your Honor.

The Court: Oh, he may answer that.

The Witness: I did not hear you.

Q. That Okes Construction was another insurance policy of some type that you had written on one of these cost-plus contracts?

A. Yes, for compensation insurance to bring the pay of Federal Harbor Workers' Benefits to injured workmen.

Q. Who arranged for that meeting between you and Mr. Northrup at Seattle?

A. I guess we arranged it ourselves.

(Testimony of I. C. Rowland.)

Q. Well, I mean, did he call you for a meeting or did you call him?

A. I believe our Seattle manager, Mr. Miller, contacted him first and arranged an appointment for me.

Q. At that time, you knew that he was looking after the insurance matters for the Public Roads Administration, did you?

A. On the Okes Construction contract.

Q. Do you recall when that meeting was in Seattle, about?

A. No, I can't give you the exact date. If I could refer [42] to my files I probably could.

Q. I show you Defendants' Exhibit A-1, Mr. Rowland, and ask you to examine that, and it purports to be a copy of a letter which you wrote, and ask you if it is—if that refreshes your recollection with respect to that meeting in Seattle with Mr. Northrup? A. Yes, I wrote that letter.

Q. And from that, can you fix approximately when your meeting in Seattle was with Mr. Northrup?

A. It must have been about June 27th, 1942.

Q. That is the date of that letter, is it?

A. Yes.

Q. Now at that meeting in Seattle did you discuss with Mr. Northrup the Lytle and Green coverage?

A. I told him—advised him what coverage had been placed.

(Testimony of I. C. Rowland.)

Q. And at that time it was only in binder form, I assume?

A. The coverage had been placed. I don't know whether the policy had been issued or whether it was just a binder.

Q. Don't your know when the policy was actually issued?

A. I can't recall the exact date the policy was issued.

Q. You refer in this letter, this exhibit that you have, to the binder? A. Yes.

Q. Enclosed him a copy of it? A. Yes.

Q. Is that correct? A. Yes.

Mr. Sager: We offer A-1 in evidence.

Mr. Peterson: Your Honor, this three-page letter, that has been handed to the witness for the [43] purpose of refreshing his recollection, only. It is a three-page letter and it contains this reference only to C. F. Lytle and Green Construction Company:

"We hand you herewith a copy of the binder which we have delivered as evidence that we have placed in the Phoenix Indemnity Company Public liability and property damage insurance covering liability and property damage insurance in connection with their operations in the building of the Alaska Highway from Slana, Alaska, easterly to the Canadian Border, approximately 155 miles. This is all of the insurance that we have bound for this assured in connection with that project."

Then he goes on to the Okes Construction Com-

(Testimony of I. C. Rowland.)

pany, two full pages of single spaced typewriting. That was tendered to the witness only for refreshing his recollection. We think it is entirely inadmissible.

The Court: Of course, the Court has not read it. What is your purpose Mr. Sager?

Mr. Sager: Well, my purpose is to show Mr. Rowland was negotiating—speaking about this contract and the Lytle and Green contract from this time on; that he recognized Mr. Northrup, who was the P. R. A. representative, as having authority at least, whatever these will show with respect to these insurance policies, and I think——

The Court: It certainly would be very relevant and material if the government were a party to this action.

Mr. Sager: It seems to me it is relevant to show—here is a policy between this company and the insured. He recognized Mr. Northrup as one qualified to negotiate on this policy, certainly, as an agent of the [44] insured, and there is no other—

The Court: I think I shall admit it and allow you an exception. I am doubtful of its relevancy outside of the very first paragraph, and that is admitted by the witness.

Mr. Peterson: That is already in evidence, anyway. I am not objecting on the ground it is a copy, but on the grounds it is irrelevant and immaterial.

(Whereupon, paragraph of letter referred to was then received in evidence and marked Defendants' Exhibit No. A-1.)

(Testimony of I. C. Rowland.)

DEFENDANT'S EXHIBIT No. A-1

(Copy)

Hansen & Rowland Inc.

General Agents

Tacoma - Seattle - Portland

Tacoma, Washington

June 27, 1942

Mr. H. R. Northrup

Hungerford Hotel

Seattle, Washington

Dear Mr. Northrup:

Re: C. F. Lytle Company and Green Construction Company, Sioux City, Iowa. Okes Construction Company, St. Paul, Minnesota

I appreciated the opportunity of discussing with you the insurance coverages which we have placed in connection with the operations of the above contractors on the Alaska Road.

C. F. Lytle Company and Green Construction Company, Sioux City, Iowa.

We hand you herewith a copy of the binder which we have delivered as evidence that we have placed in the Phoenix Indemnity Company public liability and property damage insurance in connection with their operations in the building of the Alaska Highway from Slana, Alaska, easterly to the Canadian border, approximately 155 miles.

This is all of the insurance that we have bound for this assured in connection with that project.

(Testimony of I. C. Rowland.)

Okes Construction Company, St. Paul, Minnesota.

This concern has the contract for the construction of that unit of the Alaska Road between Fort St. John and Fort Nelson, B. C., and we have bound the Phoenix Indemnity Company of New York in accordance with the Federal Harbor Workers and Longshoremen's Compensation Act as it is our understanding that all employees of the Okes Construction Company will be American citizens resident in the United States and compensation benefits will be payable under the Longshoremen's Act in accordance with the Base Defense Act.

The insurance was bound as of 12:01 a.m., June 19, 1942, and we attach hereto copy of a letter which we addressed to Mr. Wm. A. Marshall, Deputy Commissioner, Colman Building, Seattle, Washington, and copy of letter which we addressed to the Federal Works Agency, Public Works Administration, Hoge Building, Seattle.

At this writing we have been unable to secure information as to the requirements of medical aid, but we understand that the Government are at the present time handling the medical, and, until our conference of yesterday, we did not know that the insurance required would come under the War Department Plan and we were proceeding to arrange for the servicing requirements at Fort St. John on the basis of the usual coverage.

It is our understanding that the compensation of all of the associated contractors connected with Okes Construction Company would likewise be

(Testimony of I. C. Rowland.)

placed with us, because unless the volume were sufficiently large it would not warrant the installation of the necessary servicing units, and Okes Construction Company have indicated that it was their plan to request all of the associated contractors to place their insurance requirements with the same carrier.

The writer had planned to leave Seattle last night, Friday, June 26, for St. Paul to assemble the necessary information for the rating of the risk, and then proceed to New York and discuss the subject with our Home Office and, if possible, arrive at an average rate which would greatly simplify the handling of payroll reports and rate classifications. As it developed the writer was unable to leave Friday and is, therefore, leaving today.

We have also bound Underwriters at Lloyd's, London, against all-risk of loss and damage to contractors' equipment, supplies, stores, temporary structures, forms, etc., as more particularly set forth in the form let with you last night. This was in the amount of \$300,000.00, but limited to a maximum loss on any one occurrence of \$150,000.00. We have not established the rate pending the writer's discussions in St. Paul as there may be some phases of the coverage that will not be required.

We used the Lloyd's market because we were in a position to in one contract give a very broad form of coverage and since the moving in of this equipment entails a diversity of hazards, such as transportation over water involving marine perils and

(Testimony of I. C. Rowland.)

by other modes of transportation, the details of which it was difficult for us to secure at the time. Under our contracts with Underwriters at Lloyd's we are authorized to immediately accept insurances and bind the Underwriters on a **comprehensive all-risk** form, and under these contracts our firm is authorized to handle, negotiate and settle losses with drafts issued by our firm drawn upon us when the proofs of loss have been filed and accepted.

As soon as the final details of the total values and the particulars as to coverage are definitely determined the writer will write you further and discuss the matter when he meets you in Washington.

This constitutes all of the insurance which we have bound up to the present time for either of these contractors and we have been informed by Messrs. Lytle and Green and Mr. Marshall and Mr. Morris that Lytle and Green will not require compensation insurance on their contract since their employees are all designated as Federal employees.

The details of the public liability insurance for Okes Construction Company are to be discussed with them by the writer while in St. Paul, but it is our understanding that they have this temporarily bound with the Canadian Indemnity Company.

Should there be any information which you might wish the writer to obtain for you from either Okes Construction Company or Lytle and Green while contacting them at St. Paul and Sioux City, please advise either Mr. Miller or Mt. Totten of our firm and they will immediately contact the writer, and

(Testimony of I. C. Rowland.)

unless we hear from you otherwise he will communicate with you or your office on Monday, July 6, as he anticipates being in New York at the Waldorf Astoria on that date and will come to Washington at such time as may be agreeable to you.

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

/s/ I. C. ROWLAND

I. C. Rowland

Secretary

ICR:FT

Encs.

Q. Mr. Rowland, the insurance policy involved in this case was mailed to Mr. Bright of the Public Roads Administration of Seattle—the original policy?

A. I believe the original policy was mailed to Lytle and Green, and several copies were supplied Mr. Bright in Seattle.

Q. Isn't it the other way around, that the original was sent to Mr. Bright of the P. R. A., and that copies were sent to the contractors?

A. Not that I recall.

Q. I show you Plaintiff's Exhibit A-2, a copy of a letter written by you to Mr. Northrup. Is that a copy of the letter? A. Yes.

(Testimony of I. C. Rowland.)

Q. Do you want to change your testimony as to where the original went, in view of that letter?

A. Under the practice on any of these contracts, we prepare so many originals——

Q. You just answer my question, Mr. Rowland.

[45]

A. All right, what is your question?

Q. Did you send the original to Mr.—the P.R.A., or to the contractor?

A. This letter says——

Q. Never mind what it says.

A. We are enclosing a certified original.

Q. Where did you send the original, do you know, now?

A. I still say our practice would be to send it to Lytle and Green. This is a certified original.

Q. Well, I will hand you a copy of a letter. This is Plaintiff's—or Defendants' Exhibit A-4, which purports to be a copy of a letter from you to C. F. Lytle Company, and ask you to examine that.

Now, can you testify now as to who you sent the original to? A. This letter says——

Mr. Peterson: Mr. Rowland, I would like to see that.

A. This letter says we sent the original policy to Mr. Bright, Federal Works Agency.

Q. The letter of course will speak for itself, Mr. Rowland. Do you recall now to whom you sent the original policy?

A. This letter says it was sent to Mr. Bright.

(Testimony of I. C. Rowland.)

Q. You haven't any recollection?

A. I don't have any recollection.

Q. The letter speaks the truth, I presume?

A. I assume it does.

Q. Now, I show you Plaintiff's Exhibit A-3, which purports to be a copy of a letter from you to the Federal Works Agency at Seattle, and Public Roads Administration, Mr. [46] Bright—

Mr. Peterson: What date is that, Mr. Sager, please.

A. July the 30th.

Mr. Peterson: July the 30th.

The Court: It is now time for the noon intermission. We will take a recess so we will have an intermission until 2:00 o'clock, and Mr. Sager, in the meantime I want you to give consideration to the suggestion made at the outset of this case. Under the state of the pleadings as they are now, neither fraud being alleged affirmatively nor mistake being alleged nor claimed, and the Court having determined in its pre-trial hearing that the action as made by the pleadings then before it was an action upon an account stated, and I shall give you an opportunity and give consideration to an application to amend, if you desire, so to bring you within one of the proper defenses under an account stated, or, if it is the federal government's position here that it is a party directly in interest in this litigation and desires permission to intervene as such, the Court will give consideration to such a motion, but on the state of the pleadings as

(Testimony of I. C. Rowland.)

they are now, you will have to comply with the well known established rules of law concerning defenses to an account stated, and if there is—if it is claimed that there was an error in the amounts involved or in the assumption of liability or any of the other matters that might become a defense—I make this line of suggestion because you state that the proof would show as a fact that [47] numerous of these independent contractors or sub-contractors or others were not on this job at all, but there is nothing in this pleading but just a mere denial—that is the only thing you have here that would entitle the defendants to have formally submitted the pay rolls, unless they did it by error or did it with a fraudulent intent, and if they did, then it could only be availed of, no one would be taken advantage of by the government who is not a party to this action at present, and it is not the desire of this Court at all to invade the province of the administrative departments of the federal government in the matter of when they assume liability and pay on these cost-plus fixed fee contract items, and when they deny payment on them, and the difficulty of the whole situation presented here in this case is, that apparently the nominal defendants appear rather indifferent as to the outcome, and pass the burden to the federal government upon whom they assume liability shall fall, and that question is one that will have to be determined by administrative agencies of the government, rather than judicial,

(Testimony of I. C. Rowland.)

unless the government sees fit to make itself a party and bring itself before this Court so it would be bound by its judgment.

I wish you would consider the suggestion that the Court has made, because I have been rather liberal thus far in permitting even this cross-examination going rather beyond the issues as made by the pleadings here.

Mr. Sager: Of course, the pleadings deny any account stated. There can't be any question about that.

The Court: I know, but if you will examine [48] the law on an account stated, there are certain defenses that you can have, and the Court has determined in a pre-trial hearing that there was an account stated.

Mr. Sager: Well, now, then, perhaps I misunderstand, if Your Honor is taking the position that you have previously determined that question finally, and that there is only left an affirmative defense to it, then I can see where I stand. I have been assuming right along that in view of the changed pleading the question of whether or not there was an account stated was again open.

The Court: What have you set up in your pleadings that opens it, other than a denial that there is an account stated?

Mr. Sager: We have set up in addition to that, this period of negotiations and conduct between the parties, which negatives——

The Court: I take it, your affirmative matter,

(Testimony of I. C. Rowland.)

Mr. Sager, just merely sets up if liability is established here, it is going to fall on the government?

Mr. Sager: That is not the intent of my pleading. The affirmative defense, as I intended it, was to show by their course of conduct between the parties, that there was never an account stated because there was no final unequivocal meeting of minds or agreement by the defendants here to pay --no understanding or reliance by the insurance company that there was a definite agreement to pay this amount; that they had been negotiating this thing over this whole period of time. In other words, my affirmative defense goes to the question of whether there is an account stated. [49]

Now, if Your Honor says you have already ruled on that——

The Court: That is the reason we had the pre-trial hearing, and I did rule upon it at the time as the record was then made, it was an account stated.

Mr. Sager: That is true. I thought it was under the then status of the pleadings. There was an answer filed subsequently to that, which set forth this course of conduct between the parties, which I assumed would open up again at least to show the course of conduct, to show the true situation, whether there was an account stated.

The Court: I am just doubtful whether your pleadings do that in the form in which you have them.

Mr. Sager: Well, I will re-examine that.

The Court: And certainly, if the Court deter-

(Testimony of I. C. Rowland.)

mines there is an account stated, you have left yourself in a position where you haven't any right to offer proof there was an error in the sum involved—in the amount involved.

Mr. Sager: There is no question of that. It is true, under the present state of pleadings we have not.

The Court: We will recess until 2:00 o'clock this afternoon.

(Recess.) [50]

2:00 O'Clock P.M.

The Court: Now, you may proceed.

Mr. Sager: I am asking to file a second amended answer in this matter, Your Honor, in which we set up an affirmative defense.

The Court: Any objections, Mr. Peterson, to this?

Mr. Peterson: I am just examining it, Your Honor. I will be through in a moment.

I think not, Your Honor.

The Court: It may be filed.

Mr. Sager: We offer at this time, Plaintiff's Exhibits A-2, A-3—Defendants' Exhibits A-2, A-3 and A-4.

Mr. Peterson: We have no objection to Defendants' Exhibit A-2.

The Court: It will be admitted.

(Whereupon, document referred to was then

(Testimony of I. C. Rowland.)

received in evidence and marked Defendants'
Exhibit A-2.)

DEFENDANTS' EXHIBIT No. A-2

(Copy)

Hansen & Rowland, Inc.

General Agents

Tacoma, Washington

July 30, 1942

Air Mail

Mr. H. R. Northrup

Care of Insurance Section

Office of the Administrator

Federal Works Agency

North Interior Building

Washington, D. C.

Dear Mr. Northrup:

Re: Property Damage and Public Liability
Policy No. CLP 1750—C. F. Lytle Com-
pany and Green Construction Company
Etal—Alaska Highway, Slana to Canadian
Border

Enclosed herewith you will please find a certified
original copy of a public liability policy, the origi-
nal of which we have mailed to Mr. J. S. Bright,
Hoge Building, Seattle.

We trust that the policy in the form as prepared
meets with your approval, but if you have any sug-
gestions relative to the form we would appreciate
receiving them.

(Testimony of I. C. Rowland.)

With kind regards, we are

Yours very truly,

HANSEN & ROWLAND, INC.

OF ALASKA

General Agents

/s/ I. C. ROWLAND

I. C. Rowland

Secretary-Treasurer

ICR:ETM

Enc.

Copy to:

C. F. Lytle Company, Sioux City, Iowa.

Lytle & Green, L. C. Smith Bldg., Seattle, Wash.

Federal Works Agency, Public Roads Admins.,
303 Hoge Building, Seattle, Wash.

Green Construction Company, Masonic Building,
Des Moines, Iowa.

C. F. Lytle Company and Green Construction
Company, Attention: Mr. George Roach, Fair-
banks, Alaska, Slana Highway Division.

Mr. Peterson: A-3, is a statement of what the policy, by way of a letter, what the policy insures, I assume it is correct, but the policy, of course, is the best evidence of what its terms are, and I do not think Exhibit A-3 adds anything to it, except it pretends to state what the policy contains. I do not think it is admissible, if the Court please, because the policy is here in evidence.

The Court: Whose letter is it? [51]

(Testimony of I. C. Rowland.)

Mr. Peterson: It is a letter addressed to the Federal Works Agency, by I. C. Rowland.

The Court: It is a copy of a letter by the plaintiff?

Mr. Peterson: It is not objected to on the ground it is a copy.

The Court: But, it is written by the plaintiff?

Mr. Peterson: Yes.

The Court: I think I shall admit it.

(Whereupon, letter referred to was then received in evidence and marked Defendants' Exhibit A-3.)

DEFENDANTS' EXHIBIT No. A-3

(Copy)

Hansen & Rowland Inc.

General Agents

Tacoma, Washington

July 30, 1942

Federal Works Agency

Public Roads Administration

303 Hoge Building

Seattle, Washington

Attention: Mr. J. S. Bright

Gentlemen:

Re: Phoenix Indemnity Company Policy No.
CLP-1750 C. F. Lytle Company, Sioux
City, Iowa, Green Construction Company,
Des Moines, Iowa, Etal. Comprehensive
Liability.

Enclosed herewith you will please find the origi-

(Testimony of I. C. Rowland.)

nal of the above numbered policy, together with invoice for premium, which we are forwarding at the request of Mr. Harvey Rice of C. F. Lytle Company.

This policy insures bodily injury with a limit of \$50,000.00 any one person and \$100,000.00 any number of persons injured in any one accident, automobile property damage liability with a limit of \$5,000.00 each accident, property damage liability other than automobile \$5,000.00 each accident and \$25,000.00 in the aggregate, \$25,000.00 aggregate protective, and \$25,000.00 aggregate contractual.

The policy is written at a flat premium rate of 85 cents per each \$100.00 of payroll and is written on a comprehensive form covering all of the operations of C. F. Lytle Company and/or Green Construction Company and/or Frank & Orville Eblen, Ira Van Buskirk, Gus Ostermann, E. M. Dusenbergl, Inc., Sears Construction Co., J. W. Scothorn Construction Co., Frank Eblen & Hilding Ekdahl, V. L. Lundeen, Inc., Wm. Horrabin Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duvall & McKinney, J. Leo Hoak, and/or any other associated or affiliated contractors who may be employed by or associated with C. F. Lytle Company and Green Construction Company in the performance of all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska, to Canadian Line. We have attached, under Endorsement #4, a provision that no cancellation shall be effective unless notice has been given to the Insurance Section of the office

(Testimony of I. C. Rowland.)

of the Administrator, Federal Works Agency, Washington, D. C., and to yourself. The policy insures all the operations, wheresoever located, arising out of the contract.

We have attached a certification to the invoice for premium which we trust you will find in proper form.

Should you desire any further information from us in connection with the policy, you may contact us through our Seattle office, Elliot 4757.

Yours very truly,

HANSEN & ROWLAND, INC.
OF ALASKA

General Agents
I. C. ROWLAND
Secretary-Treasurer

ICR:FT

Encs.

Copy to:

C. F. Lytle Company, Sioux City, Iowa.

Green Construction Company, Masonic Building,
Des Moines, Iowa.

Lytle & Green, L. C. Smith Building, Seattle,
Washington.

Mr. H. R. Northrup, Care of Insurance Section
Office of the Administrator, Federal Works Agency,
North Interior Building, Washington, D. C.

C. F. Lytle Company & Green Construction Com-
pany Attention: Mr. George Roach, Fairbanks,
Alaska, Slana Highway Division.

(Testimony of I. C. Rowland.)

Mr. Peterson: No objection to Exhibit A-4, a letter addressed to——

The Court: It will be admitted.

Mr. Peterson: ——the defendant, the Lytle Company.

(Whereupon, letter referred to was then received in evidence and marked Defendants' Exhibit A-4.)

DEFENDANTS' EXHIBIT No. A-4

(Copy)

Hansen and Rowland Inc.

General Agents

Tacoma, Washington

July 30, 1942

Air Mail

C. F. Lytle Company

Sioux City, Iowa

Green Construction Company

Masonic Building

Des Moines, Iowa

Attention: Mr. Harvey Rice of Lytle
Construction Company

Gentlemen:

Re: Phoenix Indemnity Company Policy No.
CLP 1750—C. F. Lytle Company, Sioux
City, Iowa, Green Construction Company,
Des Moines, Iowa Etal. Comprehensive
Liability

Enclosed herewith you will please find a copy of a letter which we have addressed to Mr. J. S. Bright

(Testimony of I. C. Rowland.)

of the Federal Works Agency, Public Roads Administration, Hoge Building, Seattle, Washington, enclosing the original policy above referred to, as directed by Mr. Rice, and we hand each of you a copy of the policy herewith. We have mailed a copy of the invoice to Mr. Rice, care of the C. F. Lytle Company at Sioux City. We have drawn this contract on the Comprehensive form and we believe you will find that it meets all of the requirements of the Government, and we trust that the same will meet with your approval.

We would appreciate your checking the names of the associated contractors appearing on Endorsement #1, and if there are any omissions or changes please advise us at your earliest convenience.

We have prepared the usual certification on the premium invoice and we have forwarded to Mr. Roach at Fairbanks, Alaska, the forms for declaring payroll, and copy of our transmittal letter is handed you herewith.

You will note that we have incorporated the required provision of the Government whereby the Company waives subrogation against the United States of America, and we have also attached an endorsement relating to notice of cancellation should same be required.

If you find any errors or omissions in the policy as drawn, we would appreciate your advices.

By the delivery of Policy No. CLP 1750 all lia-

(Testimony of I. C. Rowland.)

bility under binder given on July 17, 1942, is hereby terminated and superseded by the said policy.

Yours very truly

HANSEN & ROWLAND, INC.
OF ALASKA

General Agents

I. C. ROWLAND

Secretary-Treasurer

ICR:FT

Encs.

Copy to:

Lytle and Green, L. C. Smith Building, Seattle, Washington.

C. F. Lytle Company and Green Construction Company. Attention: Mr. George Roach, Fairbanks, Alaska, Slana Highway Division.

Mr. Peterson: Mind if I interrupt for a moment?

Mr. Sager: With the witness?

Mr. Peterson: If the Court please, I overlooked this morning asking that Mr. Conley, of Portland, be entered as counsel for the plaintiff here. Mr. Conley is a member of the bar of this court.

The Court: The record may show Mr. Conley's appearance for the plaintiff. [52]

Mr. Peterson: J. L. Conley, 905 Porter Building, Portland.

I. C. ROWLAND

resumed the stand for further examination and testified as follows:

Cross Examination—(Resumed)

By Mr. Sager:

Q. Now, Mr. Rowland, well, at the time of this meeting with Mr. Northrup in Seattle, you knew that he represented the Public Roads Administration in the matter of insurance coverage on these various projects, did you not?

A. That was his statement.

Q. And you thereafter saw him in connection with this Lytle and Green policy?

A. Not as to Lytle and Green. Okes Construction Company.

Q. Well, did you discuss with him the Lytle and Green coverage at some later time?

A. Not until about the time of the cancellation, and he discussed it with me.

Q. And where was that?

A. That was in the P. R. A. office in Seattle.

Q. Was that before or after the cancellation?

A. Well, I think it was before the cancellation and I can't establish the definite date.

Q. You saw Mr. Northrup in Washington, D. C. sometime prior to that, did you not?

A. I did, yes.

Q. And Mr. La Rocque was there at that time?

A. Mr. La Rocque was with me in Washington on one trip. I [53] don't remember just which trip it was.

(Testimony of I. C. Rowland.)

Q. Did you see Mr. Northrup?

A. Yes, and that was in connection with the Okes Construction Company.

Q. By the way, who is Mr. La Rocque?

A. Mr. La Rocque was at that time the underwriting manager of the Phoenix Indemnity Company.

Q. In that capacity he had to do with the matter of rates on policies on insurance coverage?

A. Rates, and——

Q. That was his function and duty?

A. Yes.

Q. Well, at this meeting in Washington, was that—do you recall if that was prior to the cancellation of the Lytle and Green contract?

A. Well, I had several meetings I believe, with Mr. Northrup in Washington, and there must have been some meetings prior to the cancellation of the Lytle and Green policy.

Q. Of course, the actual policy itself was not delivered to anybody here until the end of July, isn't that right?

A. You are talking of the Lytle and Green policy?

Q. That is right.

A. I can't tell you without referring to my files, when the policy was delivered.

Q. Well, I am assuming the policies were sent with these letters?

A. They were sent whatever date is on those letters.

(Testimony of I. C. Rowland.)

Q. Those show July 30th, the three different letters. Prior to that time, the policy had never been submitted to [54] either the contractors or any persons representing the government?

A. Not prior to that date, no.

Q. You know on the Lytle and Green coverage that the insurance was ultimately subject to the approval of the insurance section of the P. R. A.?

A. The contract did not say that. The contract recited that the policies had to be approved by the P. R. A. as to form.

Q. What contract do you mean by that?

A. The contract between the contractor and the government. There was no reference in that contract to the insurance section.

Q. At any rate, you knew it was subject to approval by the government?

A. By the P. R. A. All the contracts of that kind are.

Q. You had a copy of this telegram from MacDonald prior to the issuance of the policy?

A. Not prior to the binding of the risk.

Q. No, but prior to the issuance of the actual policy?

A. Prior to the issuance of the actual policy.

Q. Well, this says:

“Pending final information from insurance section of the Federal Works Agency, you are authorized to secure such public liability and property damage insurance as is necessary.”

A. That was not addressed to me.

(Testimony of I. C. Rowland.)

Q. But, you had a copy of that?

A. I had a copy of it.

Q. That was presented to you by Mr. Bright, was it? A. No, by Mr. Rice. [55]

Q. Yes, Mr. Rice, prior to the time the binder was issued, is that right?

A. No, I can't establish the exact time that I got that. My recollection is that it was given to me at the time, or shortly after I delivered that binder, or the binder was delivered. I can't recall whether I actually delivered the binder or one of my employees, but that telegram was given to me somewhere along there at the time, or after the binder was delivered.

Mr. Peterson: I think none of this examination is proper cross-examination on the case as made by the plaintiff.

The Court: I think that is correct.

Mr. Peterson: We object to that.

Mr. Sager: It seems to me it is proper. They have introduced a telegram to show the authority for the insurance. They have introduced the insurance policy itself. They have introduced the letter and binder letter, and they have introduced the bid letter going for the authority for the issuance of the policy, and that is what all of this has to do with.

Q. Now, at the meeting in Washington, Mr. Rowland, between the time you saw Northrup in Seattle and when the policy was cancelled—strike that.

(Testimony of I. C. Rowland.)

Let me ask you this, didn't you go to Washington and New York very soon after this meeting with Mr. Narthrup in Seattle?

A. I left for St. Paul and New York, I believe the next day or very shortly.

Q. Yes, and on that trip didn't you see Mr. Northrup in [56] Washington? A. I did.

Q. And so that you saw him?

A. It was my recollection that I did. I can't answer——

Q. Within a matter of a couple of weeks after the visit in Seattle?

A. Yes. I can't say the correct date, but I did see him.

Q. Your conference in Seattle was about the latter part of June, am I right about that?

A. I couldn't answer that without referring to my notes.

Q. Now, then, at this meeting in Washington, was Mr. La Rocque there?

A. I can't recall definitely whether he was there at that meeting or whether Mr. Shobinger was there.

Q. Well, wasn't the Lytle and Green coverage mentioned at that time?

Mr. Peterson: Now, if the Court pleases, on this other examination, it seemed to be preliminary. I object to this as not proper cross-examination. He is trying—it probably has a proper place in his—under his affirmative defense, but it certainly is not proper cross-examination here.

(Testimony of I. C. Rowland.)

The Court: I think I will let him answer the question and see how much farther the defendant may go. He may answer this question.

(Question read.)

A. No rates were discussed. The forms were not discussed, and to my recollection the Lytle and Green contract was not discussed, only the Okes Construction Company. That was the one that all controversy was about. There [57] was no controversy whatever about Lytle and Green at this time.

Q. Well, when did the controversy about Lytle and Green start?

Mr. Peterson: We object to that on the same ground, if the Court please.

The Court: Objection will be overruled.

Mr. Peterson: It does not appear that Mr. Northrup had any authority to represent anybody in the matter.

The Court: You may answer.

(Question read.)

A. Mr. Northrup and Mr. Scadden, Mr. Totten and myself met in Mr. Morris' office in the Hoge Building in Seattle, and that meeting was called for the purpose of discussing——

Q. The question was, when, Mr. Rowland?

A. I can't give you the exact date.

Q. Can you tell us approximately?

A. Not without referring to my notes.

Q. Can you give us any approximation of the date with respect to when the policy was cancelled?

(Testimony of I. C. Rowland.)

A. Not without referring to my notes.

Q. Well, have you something you can refer to, to help you with that?

A. If I can see that cancellation notice.

Q. You know the policy was cancelled on August 31st?

A. Yes, I say I have to see the cancellation notice to fix the date.

Mr. Peterson: I think we are agreed, Mr. Rowland, that the cancellation was effective on September [58] 1st.

A. September 1st.

Mr. Peterson: 1942.

Q. Now, with respect to that date, can you tell me when this meeting in Seattle was, this second one?

A. It must have been just prior to that date.

Q. And you say Mr. Northrup was present at that time?

A. Mr. Northrup and Mr. Scadden both.

Q. The rates on the policy were discussed at that time?

A. No, they were not discussed, not on Lytle and Green. The Okes Construction Company was.

Q. Wasn't anything said about the Lytle and Green contract at that time?

A. Yes, there was.

Q. Didn't they object to the rate?

A. Not at that time, they did not object to it.

Mr. Peterson: I think this is improper cross-examination. We are suing on an account stated. The only way they can impeach the account——

(Testimony of I. C. Rowland.)

The Court: Sustain the objection to the last question.

Mr. Sager: Allow an exception. I think that is all.

Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, I want to direct your attention now to Defendants' Exhibit A-4, and calling your attention particularly to the first paragraph of that letter for the purpose of refreshing your recollection, I ask you now [59] at whose request, if anybody's, you delivered a policy to the Federal Works Agency?

A. Mr. Rice of the Lytle and Green Company.

Mr. Peterson: Yes, that is all.

Mr. Sager: No further questions.

By Mr. Peterson (continuing)

Q. Now, will you please—that is Defendants' Exhibit—what is it? A. A-3.

Q. A-3. You will notice that an invoice is referred to in the communication. I think it is on the first page, Mr. Rowland? A. Yes.

Q. Will you please state what invoice that was?

A. It must have been the invoice for the deposit premium.

Q. The deposit premium, that is the invoice for \$5,000.00? A. Yes.

Q. Now, did you render any other invoices to Lytle and Green, other—excepting the five thousand and the sixteen thousand a hundred and fifty-three?

(Testimony of I. C. Rowland.)

A. I couldn't answer that without referring to the file. I can answer as to what our custom is.

Q. Well,——

A. Each month as we get——

Mr. Sager: Just a moment, I don't think his custom is matter that is material here, or competent.

Mr. Peterson: Well, what is your recollection about it, if you are able to——

A. I wouldn't have anything to do with the billing in the interim period. That is done by the [60] accounting board. Normally we send a statement each month as the pay rolls are submitted.

Q. What is the date of the letter you have before you?

A. This is July 30th, 1942.

Q. That was some invoice that—that was some invoice then presented at that time or before?

A. Yes, that would be for the advance deposit premium.

Q. Was there any objection to that invoice made by Lytle and Green, or P.R.A., or anybody else? A. No.

Mr. Peterson: That is all.

Recross Examination

By Mr. Sager:

Q. It was never paid?

Mr. Peterson: No, it was never paid.

Q. It was never paid?

A. No, it was never paid.

(Testimony of I. C. Rowland.)

Q. And this invoice of \$5000.00 deposit premium, you mailed that also to the Public Roads Administration?

A. At the direction of Mr. Rice.

Q. And that contains a certificate. I show you this invoice which is Plaintiff's Exhibit 5, Mr. Rowland, and call your attention to the certificate at the bottom of it. What was the purpose of that certificate?

A. It is a certification showing what the charges were.

Q. Well, do you ordinarily put that certificate on every invoice you out?

A. On all construction contracts of this kind we do.

Q. Where the government was paying the bill?
[61]

A. No, where the government or a private individual was.

Q. Wasn't that certificate required either by Rice or P.R.A. in order to obtain payment through the government?

A. We were not so notified. We attach it because we know it is the custom.

Q. You say that you require this on any contract?

A. On any contract that is a fixed fee contract.

Q. Well, you don't have any fixed fee contracts except for the government, where the government is involved?

A. I beg your pardon, but we certainly do.

(Testimony of I. C. Rowland.)

Q. What is that? A. We do.

Q. And you did not send that invoice or a copy of it to Lytle and Green, did you?

A. Yes, we did.

Q. You did not send that to them, did you?

A. It is billed to Lytle and Green, and the invoice went to Lytle and Green.

Q. What is that?

A. It is billed to Lytle and Green and the invoice went to Lytle and Green.

Q. Didn't you send the invoice to P.R.A.?

A. A copy of it, probably went there, and maybe the original as requested by Mr. Rice.

Q. I am just asking you what the situation was. What you did was to mail the original invoice to the P.R.A. and a copy to Mr. Rice, isn't that correct? Will you examine these two letters and in the first paragraph or two, and see if that is right?

A. It does not say it is the original premium. It says: [62] "Enclosed herewith you will please find the original of the above numbered policy, together with invoice for premium, which we are forwarding at the request of Mr. Harvey Rice."

Q. Now, read the other letter and see what that says with respect to premiums.

A. This says: "Enclosed herewith you will please find a copy of a letter which we have addressed to Mr. J. S. Bright of the Public Works Agency, Public Roads Administration, Hoge Building, Seattle, Wash., enclosing the original policy

(Testimony of I. C. Rowland.)

above referred to, as directed by Mr. Rice, and we hand each of you a copy of the policy herewith. We have mailed a copy of the invoice to Mr. Rice, care of C. F. Lytle Company at Sioux City. We have drawn the contract on the comprehensive form and we believe you will find that it meets all of the requirements of the government, and we trust that the same will meet with your approval."

Q. That is the letter to C. F. Lytle Company?

A. That is addressed to C. F. Lytle Company and Green Construction Company.

Mr. Sager: I think that is all.

Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, you were asked about this contract. That is the original contract between the Federal Works Agency and Lytle and Green. When did you first see a copy of that?

A. I can't establish the date. We were provided a copy just before this trial, when I first had an opportunity to read it.

Q. That is what I wanted to get at. When did you first have an opportunity to examine this contract? [63]

A. Just prior to this trial.

Q. And who was that received from?

A. From Mr. Sager.

Q. Through me? A. Through you, yes.

Q. And when did you first see a copy of these unit price contracts?

(Testimony of I. C. Rowland.)

A. At the same time—or, no, after that. I believe that you gave me a copy a few days following that.

Q. And how long ago was that?

A. Oh, it is within—oh, just a couple of weeks or a week.

Mr. Peterson: Yes. Now, I think that is all.

Recross Examination

By Mr. Sager:

Q. You don't mean to give the impression, Mr. Rowland, that you did not know the government's interest in this contract before you saw the actual contract with the government?

A. I knew the government was awarding these contracts to build the roads, yes.

Q. You knew that the government was interested in the insurance policies?

A. No, they were not named as an assured.

Q. You knew they were interested in the insurance policy?

A. They were not named as an assured.

Q. You mean by that, they did not have any interest in it, or the premium?

A. They were not named as assureds.

Q. You mean, the government was in no way interested in the [64] coverage?

A. They were awarded the contract, but I don't know what the relations were between the government.

Q. You knew that they had an interest in the coverage?

(Testimony of I. C. Rowland.)

A. They had no interest in the coverage, because they were not named as an assured.

Q. You knew they had an interest in it, either the premium or the policy?

A. No, they were not named as assured.

Mr. Peterson: Object.

Q. As a matter of fact, the policy contains two special endorsements referring to the government?

A. Can't be cancelled without giving the government notice. Right of subrogation does not lie against the government.

Q. Those were special endorsements attached to the policy at the direction of whom?

A. Mr. Rice.

Q. So that you knew at least the government had some interest in that policy?

A. They were not named as an assured in the policy.

Mr. Sager: I think that is all.

Redirect Examination

By Mr. Peterson:

Q. Now, this cancellation provision in the policy by which the P.R.A. was to be notified of cancellation, I will ask you whether that is usual or unusual in these contracts, either private or public?

A. No, it appears in many contracts, the same provision, where the work is being done under contract for another. [65]

Mr. Peterson: That is all.

The Court: To whom did you look for payment

(Testimony of I. C. Rowland.)
of the premiums on this contract?

A. Lytle and Green.

The Court: Did you receive any payments on account of it at all?

A. No, sir.

The Court: This item labeled deposit \$5000.00, was that never paid?

A. That was never paid.

The Court: Well, the policy on its face would indicate that there was a payment of that sum made?

A. Yes, it recites a consideration, but the consideration was not paid. The premium was never paid.

The Court: Then, when you submitted this statement as involved here in this litigation, this sixteen thousand some odd dollars, it includes the five thousand dollars?

A. Yes, it does. In other words, in the event that the actual premium under-runs the deposit premium, of course you adjust it in the final——

The Court: That is all.

z

Mr. Peterson: Just one question.

Q. In the regular course of your business, how do you bill here, on sixty days or what?

A. I didn't get that.

Q. In the regular course of your business.

Mr. Sager: I don't think that is material.

A. On an account like Lytle and Green, you just bill it.

(Testimony of I. C. Rowland.)

Q. Did you have a practice of billing at any particular [66] period?

A. We sent them a statement every month.

Q. Every month? A. Yes.

Q. Well, is there any practice in transactions of this kind, the company carries the premium sixty days?

Mr. Sager: I object to that.

The Court: He may answer.

A. Yes, we carry those premiums longer than sixty days.

Q. I mean, the general practice?

A. That is the general practice, sixty days is the normal credit period.

Mr. Peterson: That is all.

Mr. Sager: That is all.

(Witness excused.)

Mr. Peterson: Mr. Tinius, take the stand, please.

EARL TINIOUS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name to the Court?

A. Earl Tinius.

The Court: How do you spell your last name?

A. T-i-n-i-u-s.

(Testimony of Earl Tinius.)

Q. Mr. Tinius, what is your occupation? [67]

A. Auditor for Hansen & Rowland.

Q. How long have you been auditor there?

A. Three years.

Q. I will ask you whether or not you are a certified accountant?

A. No, sir, I am not, sir, a certified accountant.

Q. Now, as an auditor, are you familiar with premium audits of insurance companies?

A. Yes, I am.

Q. How long have you been in that line of business?

A. Three years I have been with Hansen & Rowland.

Q. I show you Plaintiff's Exhibit No. 10 and ask you if you have seen that before?

A. Yes, I have.

Q. When did it come into your hands first, or if it came into your hands?

A. On the 22nd of September, 1942.

Q. And from whom did you receive it?

A. I got it from Mr. W. E. Corbin, the accountant in the Public Works Administration office in the Hoge Building, in Seattle.

Q. Yes, and just tell the circumstances about your obtaining that. how it came about?

A. Well, I was advised by Mr. Rowland, by his superior, to obtain the pay roll figures for the Lytle and Green policy, C. L. P. 1750, and as it was being cancelled, and they wanted the premium determined up to midnight on August 31st, 1942, I called the

(Testimony of Earl Tinius.)

Seattle office of Lytle and Green and they advised that they had no pay roll record of the Alaska payments, and that the infor- [68] mation could be obtained from the Public Roads Administration office in Seattle, and I called Mr. Corbin and made an appointment for September 21st, and went up and advised him what I wanted. That is, the reimburseable pay roll for the Lytle and Green Construction Company on the 155 miles from the Canadian border to Slana, Alaska, and he advised me it would be a big job to take it from the vouchers that were presented to them for payment, but that they had cards set up on the machine and they would take the payrolls off the machine and let me have a copy of it, and advised me to call back the next day to pick it up, which I did.

Q. And that is the way you came into possession of Exhibit No. 10? A. Yes, sir.

Mr. Peterson: We offer Exhibit No. 10 in evidence, if the Court please.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. Now, Mr. Tinius, is there any recognized manual for computing short rate premiums?

A. Yes, there is.

Q. Just a minute, now, adopted by insurance writers generally? A. Yes, there is.

Q. What is the name of that manual?

A. Pay Roll Auditor's Hand Book. [69]

(Testimony of Earl Tinius.)

Q. And have you one with you?

A. I have, sir.

Q. Under—I ask you if the hand book is generally—in general use, and generally employed by pay roll auditors?

A. As far as I know.

Q. And that is issued by what?

A. Issued by the National Bureau of Casualty & Insurance Underwriters.

Q. Yes.

A. It is a recognized national institution.

Q. Now, have you made a calculation as auditor of these various items, the pay roll indicated in Exhibit No. 10 and the three certificates which have been introduced in evidence here which—you are familiar with those, are you, that were furnished by Lytle and Green Company?

A. Yes.

Q. Have you made computations as to the total of the premium?

A. I have.

Q. As of August 31st, 1942?

A. Yes, sir, I have.

Q. State what that is.

A. The total pay roll was \$1,055,214.02.

Q. And what portion of that pertained to the office force of Lytle and Green at Seattle, or——

A. There was \$6,650.90 reimbursable pay roll in the Seattle office.

Q. How much was that?

A. It was \$6,650.90, reimbursable pay roll in the Seattle office of Lytle and Green. [70]

Q. May I see those exhibits, please?

Mr. Peterson: There seems to be a little dis-

(Testimony of Earl Tinius.)

crepancy between the certificate and your figures. I want to inquire about that.

Q. I direct your attention to the second page of Exhibit A-8? A. Yes.

Q. You will notice that the certificate is in a different amount than you——

A. Well, that is correct, in that they show some of the pay roll as not reimbursable and some of the pay roll was incurred prior to the effective date of the policy.

Q. Oh, well, now, the amount that was connected with that office over there alone was what?

A. \$7,813.23.

Q. Where do you get those figures?

A. That is the total of the Seattle pay roll.

Q. How much?

A. Total of the Seattle pay roll was \$7,813.23, and that portion which was not reimbursable and incurred——

Q. I just wanted to get the reimbursable.

A. The reimbursable is \$6,650.90.

Q. That does not seem to correspond with Mr. La Rocque's certificate. How did you account for the difference between your figures and his?

A. I don't quite understand what you mean.

Q. Well, you look at the bottom of his certificate there, it is \$5,900.00, isn't it?

A. Yes, at the top there is an item of \$1,912.50 that has not been added to the five thousand. [71]

Q. That is all right, then.

(Testimony of Earl Tinius.)

Mr. Peterson: May I have the exhibit back, please?

Mr. Sager: I am willing to stipulate that this \$16,153.73 is the amount claimed—amount prayed for, it is the amount of premium arrived at by virtue of the short rate table on a total pay roll of \$1,055,214.02. I am not conceding that is the proper pay roll or the proper basis, but that is——

Mr. Peterson: There is a bill of particulars, Your Honor, with a photostatic copy of the table attached. I would like to have that in evidence. It is part of the file in this case, to be considered, but I prefer to have it—at least the cancellation table made an exhibit.

The Court: I don't know for sure that I have in mind as to just what you——

Mr. Peterson: Very well.

The Court: You may take it out of the files. If you want it in the record that way, you may do that.

Mr. Peterson: Instead of taking the record apart, I will approach the matter in another way. Thank you.

Q. Mr. Tinius, what was the straight premium, disregarding short rates—straight earned premium?

A. The straight earned premium without regard to short rate was eight thousand, nine hundred and sixty-nine thirty-one.

Q. Then, you apply to that, for the purpose of determining short rate cancellation of premiums, you apply to that [72] what factor?

(Testimony of Earl Tinius.)

A. A factor of 1.801.

Q. That is in accordance with this manual?

A. That is correct.

Q. I show you now Plaintiff's Exhibit No. 16, and ask you whether or not that is a photostatic copy of the page of the manual having reference to this matter? I think you furnished it to me.

A. Yes, that is a photostatic copy.

Q. Yes. Now, what is the practice with respect to carrying forward the decimals and making computations?

A. In computations, particularly in the insurance work, we only carry decimals out to three places, and if the fourth decimal is of—digit is of five or greater, we make the third decimal the next highest amount, but if the fourth decimal is less than five we just drop it.

Q. Did you employ that method in arriving at this short rate cancellation premium?

A. That is right.

Mr. Peterson: Is there any objection to this? We offer in evidence Plaintiff's Exhibit 16, being a photostatic copy of the Underwriters' tables.

The Court: It will be admitted in evidence.

(Whereupon, photostatic copy of Underwriters' tables referred to was then received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Peterson: Cross-examine. [73]

(Testimony of Earl Tinius.)

Cross Examination

By Mr. Sager:

Q. Mr. Tinius, I did not get your total pay roll figures exact. I got part of it. Now, will you repeat them?

A. The total pay roll figure was \$1,055,214.02.

Q. And that you computed from these certificates submitted by Mr. La Rocque, together with this long tape, Exhibit 10, it is here, which you got from the P. R. A.?

A. That is right.

Q. The item of \$6,650.90 which you say was the Seattle pay roll of Lytle and Green, is included in the one million fifty-five thousand odd dollars?

A. Yes, that is right.

Mr. Sager: I have no further questions.

Mr. Peterson: I think that is all.

(Witness excused.)

Mr. Peterson: The plaintiff rests, Your Honor.

The Court: You may proceed.

Mr. Sager: Will you take the stand, Mr. Northrup? [74]

H. R. NORTHRUP,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

(Testimony of H. R. Northrup.)

A. H. R. Northrup.

Q. And what is your present occupation?

A. Chief of the safety and insurance division, Federal Works Agency, Washington, D. C.

Q. How long have you been in that position?

A. That particular title about a year.

Q. What was your occupation?

A. Prior to that, it was chief of the insurance division of the same agency.

Q. The Public Works?

A. Federal Works Agency.

Q. Federal Works Agency. What is the, if any, connection between the Federal Works Agency and the Public Roads Administration?

A. The Public Roads Administration is one of the constituent administrations of the Federal Works Agency.

Q. In 1942, June—in June, 1942, and on, what was your occupation?

A. In June, 1942, on, chief of the insurance section of the Federal Works Agency.

Q. Now what were your duties in that position with respect to insurance coverages on cost-plus contractors with the government? [75]

A. In addition to the cost plus fixed fee projects, we do have certain other problems of bonds, for instance of performance bonds on lump sum contractors, and in some instances the government, contrary to the usual practice, buys insurance for protection of its own properties under the Lenham Act that is permitted, and in other cases where the

(Testimony of H. R. Northrup.)

federal government builds schools and hospitals and other facilities——

Mr. Peterson: This is incompetent, but is it necessary to go into that in this matter—in this case?

Mr. Sager: I think it is probably a little beyond the scope of my question.

The Witness: I am sorry.

Q. With respect to public works, P. R. A. contracts, what were your duties?

A. Oh, we had no insurance problems on P. R. A. contracts, except in connection with cost plus fixed fee contracts.

Q. Well, then, with those contracts, what were your functions?

A. There to see that the contractor got the proper insurance, either that which was authorized by the contracting office or approved by him in a sound insurance carrier, the proper rates and that the coverage itself with the necessary endorsements, was proper.

Q. Were you generally in charge of insurance and allied matters with respect to these contracts?

A. Yes, sir.

Q. Do you know Mr. Rowland?

A. Yes, sir.

Q. When did you first have occasion to meet him? [76]

A. Late in June, 1942.

Q. Where? A. Seattle, Washington.

Q. And how was that meeting brought about?

(Testimony of H. R. Northrup.)

A. I had arrived at the Hungerford Hotel that afternoon. About half an hour after I arrived, Mr. Rowland telephoned me from Tacoma and said he heard that I was coming to town, and would like to talk to me—would like to see me that afternoon, as he was leaving for Boston and New York, so I hadn't yet gotten in touch with the Public Roads people here, and agreed to see Mr. Rowland immediately, and he was over within forty-five minutes with several of his assistants—I have forgotten the names now. He met me at the Hungerford Hotel.

Q. At that time, did you know whether Mr. Rowland had been instrumental in issuing any insurance or coverage—generally speaking, any insurance contracts with the P. R. A. on these contracts?

A. I do not recall that he said that he actually issued any coverage at that particular time, but the purpose of the meeting was to discuss the coverages that would be needed, and the way they should be written.

Q. On which contract?

A. Oh, at that time we discussed, as I recall, the Lytle and Green risk, and the Okes Construction Company. Those are the only two at that time.

Q. At that time did Mr. Rowland's agency have any insurance in force in the Okes contract?

A. I don't recall that he said at that meeting, Mr. Sager, but if I might refresh my memory from

(Testimony of H. R. Northrup.)

a letter written [77] me the next day—might I ask for that question, please?

(Question read.)

A. If this is a proper answer, a day or two later on June 27th, Mr. Rowland wrote me with reference to Lytle and Green and Okes Company in the same letter, and Mr. Rowland stated regarding Okes:

“This company has the contract for the construction of that unit of the Alaska road between Fort St. John and Fort Nelson, British Columbia, and we have bound the Phoenix Indemnity Company of New York in accordance with the Federal Harbor Workers’ Act”——

So that would mean there was a binder out on Okes.

Q. Were you aware of that prior to your meeting with Mr. Rowland? A. No, sir.

Q. And what was the nature of your discussion with Mr. Rowland at that meeting in Seattle, or what matters did you discuss there generally?

A. Well, Mr. Rowland and his several assistants merely wanted to know the general setup, and what our requirements would be, and I recall that I handed Mr. Rowland several copies—mimiographed copies of what we call our comprehensive insurance rating plan, which is a special plan used by our agency and other departments on cost plus fixed fee contracts where the insurance premium is five thousand dollars or more, and we talked in general

(Testimony of H. R. Northrup.)

terms, and as I recall it, Mr. Rowland said he had these two risks, Lytle and Green and Okes, or was about to get them, and I told him the plan would be required to be [78] used under our setup, being of course, a cost plus fixed fee job.

Q. On these two contracts?

A. Yes, sir, I believe there was a little discussion at the time about equipment insurance, although I can't say for a certainty. Shortly thereafter there was. I said we did not want any insurance on the contractors' equipment. It was a sort of general discussion the first time, and I had not expected to be contacted even by Mr. Rowland, but he called me up and I agreed to a conference.

Q. Now, did you at any later time see Mr. Rowland?

A. Yes, sir. I don't believe of any consequence, but I believe I met him on the street the next day, but we did not go into——

Q. Did you have another conference with him, or meet him?

A. Just—it might have been for a few moments. It was not scheduled.

Q. I mean, at any later time?

A. Oh, following that I would say approximately July 10th, Mr. Rowland came to my office in Washington. When he left here he told me he was going to Boston and New York and would call my office in Washington from New York and see when I would be back, and then come down to

(Testimony of H. R. Northrup.)

Washington, and I was out here a little less than two weeks, flew back, and we had a conference in my office approximately July 10th with Mr. Shobinger and Mr. Groff.

Q. What is the other name?

A. Shobinger, in charge of the claim department of the [79] Phoenix Indemnity Company home office.

Q. At that meeting, what was discussed if anything with respect to this contract, the Lytle and Green insurance?

A. There was some discussion of the 85 cent rate mentioned in the binder. By that time, I had a copy of the binder, and while it did not give any details of the coverage, and I couldn't go into details, the matter of rate naturally stood out, 85 cents, which I considered excessive and we discussed that. That was the only discussion I recall at the time on Lytle and Green.

Q. Now, have you had discussions at any time subsequent to this meeting in Washington with Mr. Rowland, with respect to the Lytle and Green contract?

A. Yes, whenever I came to Seattle, and I was out again the next September, there was some brief discussion. There was some discussion in Mr. Morris' office of the Public Roads Administration, but it was tied in with many other matters, and I don't recall the details, but I know we referred to the 85 cent rate again, and then there was some telephone discussion on a Saturday afternoon about

(Testimony of H. R. Northrup.)

payment of the premium—he wanted to know when the premium was going to be paid.

Q. Who was this telephone conversation with?

A. Mr. Rowland called me in Seattle. I was in Seattle, and I believe he was too, or maybe it was Tacoma—called me at the Public Roads office about the premium of Lytle and Green and Okes. That was after the policy had been cancelled.

Q. Do you recall what was said with respect to the premium? A. What I said? [80]

Q. Well, what either one of you said?

A. Well, Mr. Rowland wanted to know when the bill was going to be paid and I said that we would have to do something about the rate of 85 cents; that it was excessive in my judgment.

Q. Was that before or after the cancellation?

A. That was after the cancellation.

Q. And that was this telephone conversation?

A. Yes, that was the telephone conversation and also a conversation of a day or two before in Mr. Morris' office.

Q. Did you have the same sort of discussion in the office?

A. Yes, it would always come back to Lytle and Green, when are we going to get the money.

Q. Well, in this meeting at Mr. Morris' office in Seattle, was the matter of the rate discussed at that time? A. Yes.

Q. Who was present at that meeting?

A. That was in September. Mr. Rowland, and I believe Mr. Miller, some one else from Mr.

(Testimony of H. R. Northrup.)

Rowland's office, Mr. Morris in the Public Roads Administration, and Mr. Scaddon, of San Francisco, and myself. I don't recall any one else.

Q. Who is Mr. Scaddon? What is his connection?

A. Mr. Scaddon is an insurance examiner for the corps of engineers of the War Department, and he is located in San Francisco, and I used him in connection with this work because he was thoroughly familiar with the West Coast conditions, and frequently——

Q. Well, that is sufficient.

Now, this meeting in Seattle in September——

[81]

A. Yes, sir.

Q. Was that before or after the cancellation?

A. After.

Q. Now, did you—by the way, do you know Mr. La Rocque? A. Mr. La Rocque?

Q. Mr. La Rocque. A. Yes.

Q. And who is he?

A. He at that time, when this policy was issued, was superintendent of the liability and compensation department, as I recall it. He is now vice president of the Poenix Indemnity.

Q. And did you have any discussions with him with reference to this Lytle and Green contract?

A. Yes, sir.

Q. When was the first one that you can tell us?

A. If I may refer to correspondence there it would be helpful. I couldn't be sure of these dates,

(Testimony of H. R. Northrup.)

but it is quite evident that on November 17th Mr. La Rocque and Mr. Rowland came to my office in Washington. On November 12th, Mr. La Rocque wrote me confirming a phone conversation, stating that he and Mr. Rowland would be in my office on the 17th, and I recall that there was no change in that. I am pretty sure they were there at that time and we then discussed the Lytle and Green and Okes risks. Mainly, the Okes Construction Company at that time, but as I say, every time we discussed Okes, we brought in the Lytle and Green in some way.

Q. Well, now, generally, what was the discussion with respect to Lytle and Green's contract?

[82]

A. It was always with reference to the rate. We never got much farther, because as the correspondence shows—and I recall the thought we would get the Okes Construction policy out of the way, there was quite a controversy regarding it and the general feeling on the part of all of us was to get rid of that and then we will talk about Lytle and Green, and it was, I believe, in April of '43 when the Okes case was finally adjusted, and then we got into the Lytle and Green in more detail.

There had also been another meeting with Mr. La Rocque and Mr. Rowland in New York. I believe it was early in 1943.

Q. Did you have correspondence with Mr. La

(Testimony of H. R. Northrup.)

Rocque with reference to the Lytle and Green contract?

A. Yes, sir.

Q. Mr. Northrup, handing you Defendants' Exhibit A-5, which contains a number of letters, both originals—some originals and copies, will you examine that and state what it is?

A. Well, the first letter is dated November 24th. It is from Mr. La Rocque, Superintendent of Compensation Liability Department.

Q. First let me ask you this, examine it and tell us if it contains correspondence between you and Mr. La Rocque, either the original or copies, concerning the Lytle and Green contract?

A. Yes, sir, it does.

Q. And I think that is in order—chronological order. What period of time is covered by that correspondence?

A. November 24th, 1942, to August 4th, 1943. It appears to [83] be in chronological order.

Mr. Sager: I offer that in evidence.

Mr. Peterson: If the Court pleases, it appears from the admissions in the answer and the affirmative defense that the alleged mistake, if any, occurred prior to the 30th day of January, 1943, when Mr. Rice wrote the reply to the letter of January 25th, 1943, of Mr. Rowland, a letter which, with the statements and other circumstances constitute the account stated. Any evidence of negotiations carried on by Mr. Northrup, or discussions that he had subsequent to January 30th, 1943, sent to me, are clearly immaterial.

(Testimony of H. R. Northrup.)

The Court: Well, you say all of those letters are subsequent to that date?

Mr. Peterson: No, Your Honor, I do not want to be understood as saying that. There are three or four that are prior to January 30th, and the others, if they are in order, are subsequent to that time. Clearly, they are not admissible to prove a mistake which culminated in this letter of January 30th.

The Court: Of course, without examination of them I cannot tell what they deal with. If they deal with anything that bears on the issue of misapprehension of the facts as alleged by the defendant in its second amended answer and affirmative defense, then it would not matter whether they were prior or subsequent.

Mr. Peterson: I cannot quite follow Your Honor in that, if they were the defendants' statements subsequent to the time.

The Court: They might be self-serving. [84]

Mr. Peterson: That is what I was going to suggest, and this correspondence does not appear to be between the defendants here and Mr. Northrup. They are all of Mr. Northrup's letters to Mr. La Rocque.

Now, the burden I understand these gentlemen have is to prove the mistake on the part of the defendants here, and it seems to me that there is no purpose in encumbering this record by showing writings between third parties here, having no

(Testimony of H. R. Northrup.)

bearing on it—it seems to me no bearing on the question at all. If they were defendants' writings, they would come under the rule of self-serving declarations, but they do not seem to me that the defendants here could show a mistake on his part by introducing in evidence here a letter written by somebody else that did not purport to represent him.

The Court: The plaintiff here, is seeking to maintain this action upon an account stated, but the items that go to make up that account stated are items of liability growing out of the insurance contract, and the insurance contract covers such items as employees of the construction contractors and liability thereunder. The defendant has submitted to the plaintiff his pay roll for such employees, upon which the calculation was based that resulted in the amount here involved being the account stated, according to the theory of the plaintiff and according to the Court's holding. Now, the defendant comes in and says that he was in error in the names that he submitted as employees, and the amounts that were paid to them, and that they were as a matter of fact, not employees at all that would be covered by this contract [85] of insurance, but were employees of the United States government, and such a defense is a proper defense to an account stated.

Mr. Peterson: I do not take any issue with the Court on that.

The Court: Now, then, if these letters bear

(Testimony of H. R. Northrup.)

upon that issue, whether they be prior or subsequent to the time that he wrote this letter that the Court has used as a basis of finding that there was an account stated here, they would be competent, and if they do not, they would be incompetent.

Mr. Peterson: Well, I cannot agree with the Court on that. The letters written subsequently would be self-serving, but none of these letters that are offered were written by the defendants or either of them.

The Court: No, but the defendant might find himself in the position where he has to rest his proof upon some source outside of his own statements or facts.

Mr. Peterson: That is true, but——

The Court: And here he alleges that these employees were employees of the United States Government, and I assume now that the writer of the letters or part of them, is the witness.

Mr. Peterson: Yes.

The Court: And the witness is a representative of an agency of the government that was directly involved in this construction.

Mr. Peterson: Your Honor——

The Court: Likewise involved—not the witness, but the governmental agency, in the contract of insurance [86] by one of the riders. Some reference was made to it.

Mr. Peterson: The effect of plaintiff's pleading is that prior to January 30th, 1943, I made a

(Testimony of H. R. Northrup.)

mistake in reporting these items of pay roll. That is his plea.

Now, we contend that these letters or writings subsequent to that time by the defendant himself would be self-serving declarations. We contend that any writing between—not authorized by the defendant—this is his mistake now that he has to prove. Any letters written by somebody else who were not—was not especially authorized to represent him and speak for him are clearly immaterial. Letters written subsequent to the time he says his mistake was completed. His mistake, if it was made, was made prior to January 30th, 1943, and it must depend on things which occurred prior to that time.

Now, what bearing has the letter of the witness here? We will just take for instance——

The Court: Addressed to the plaintiff?

Mr. Peterson: Yes, addressed to the plaintiff. He refers to Lytle and Green:

“This case is more or less tied up”— This is a letter of February 19th, or rather, this is Mr. La Rocque’s letter:

“This case is more or less tied up with the Okes Construction Company in that both coverages related to the same project but two different sections, and Okes involved compensation, whereas this involves only the comprehensive liability including automobile. We have not had any reply to our letter of January 4th, which in [87] turn followed up earlier letters. There has been no payment of

(Testimony of H. R. Northrup.)

any earned premium to us, although the earned premium on a short rate basis amounts to \$16,153.73, which has been billed to the assured. Short rate cancellation seems to be in order in view of the fact that the policy was not cancelled by the insurer, but rather at the request of the insured after insistence by the P.R.A. that the insured effect cancellation.

“We understand Mr. Scaddon has been trying to communicate with Mr. Rowland on the subject, but as Mr. Rowland is absent from Tacoma and is not expected back for three or four weeks, perhaps we can get together with you on it at the same time we attempt to bring the Okes Construction matter to a conclusion.”

I don't know that there is a reply to that letter. I just don't want to encumber the record with the matter at all, because it encumbers the record for the purpose of an appeal.

The Court: How many of those letters are there?

Mr. Peterson: That are, subsequent to January 30th, there is one, two, three, four, five, six, seven, eight, nine, ten, and they are all between Mr. La Rocque, who stood in the shoes of the plaintiff it is true, and Mr. Northrup. I don't think the contents of them, that any of them seems to be material anywhere. They are discussing the formulas, for instance this letter:

“Dear Mr. La Rocque:”

This refers to both contracts——

(Testimony of H. R. Northrup.)

“Thank you for your letter of April 12th. I expect to be in Washington on Wednesday, April 21st, and [88] shall look forward to seeing you in my office at 11:00 o’clock that morning.

“I had in mind using a rate of \$6.46 for the Okes Construction Company workmen’s compensation coverage and I believe from your letter that we should have no difficulty in arriving at something acceptable to all parties concerned.

“With reference to the Lytle and Green Construction Company, I am now awaiting certain additional information from the field which I hope to have by the time we meet in Washington next week.

“Looking forward to seeing you, I am,

“Very truly yours,

“H. R. Northrup.”

Can a letter of that kind possibly have any bearing upon a mistake made by the defendant prior to January 30th, 1943?

The Court: Of course, anything in connection with some other contract would have no bearing at all. However, I think I shall have to admit them. I will have to read them all and ascertain if there is anything in them. I shall admit them and allow you an exception.

Mr. Peterson: Very well.

(Whereupon, correspondence referred to was then received in evidence and marked Defendants’ Exhibit A-5.)

(Testimony of H. R. Northrup.)

DEFENDANTS' EXHIBIT No. A-5

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue, New York

November 24, 1942

Mr. H. R. Northrup
Chief, Insurance Section
Federal Works Agency
Room 5124
No. Interior Building
18th & F Street, N. W.
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company, etal

In the course of our discussions regarding this policy, as well as the Okes Construction Company Compensation coverage in our office last Saturday morning, it was agreed that we would send you a breakdown of our premium charges. The actual payroll has been \$1,055,214.02 for the period from June 17th to August 31st inclusive that our policy was in force. At our policy rate of 85c, which was for comprehensive coverage, including automobile, and with the Property Damage coverage including blasting, collapse and underground damage, our total earned premium on a pro rata basis would be \$8969.32. Inasmuch as the policy was cancelled at the request of the Assured, not by the Company, and at the time of the cancellation the work was not completed, a short rate cancellation would be

(Testimony of H. R. Northrup.)

in order, and the short rate earned premium would be \$16,153.73.

At the time we first negotiated for this coverage, which was awarded to us strictly on a bid basis, the Manual charges would have aggregated somewhat over \$2.00 in terms of rate. To show what actually happened, we have prepared the following exhibit:

MANUAL CHARGES

Actual Exposure	Current Manual Rate	Current Manual Premium
\$1,055,214.02	M & C P. L. .964*	\$10,172.26
	M & C P. D. .998**	10,531.04
120 trucks	Auto B. I. 11.22***	1,346.40
5 Passenger Cars	Auto B. I. 4.70***	23.50
	Auto P. D. 1.85****	9.25
Total Manual Premium		\$23,007.65
Short Rate Factor		1.801
Short Rate Earned Premium		\$41,436.77

* Based on Washington Manual rate Code 3450 increased for 50/100 limits.

** Based on Washington Manual rate Code 3450 increased for 5/25 limits excluding blasting, collapse and underground damage.

*** Based on annual rate of \$54.61 per unit for trucks, \$22.86 per unit for passenger cars, 50/100 limits pro rata.

**** Based on annual charges of \$37.50 per truck, \$9.00 per passenger car, for \$5000 limit pro rata.

Even without including any loading for blasting, collapse and underground damage coverage, and making no allowance for possible exposure with respect to sublet work or other "unknown" hazards, the average Manual rate figures out to

(Testimony of H. R. Northrup.)

\$2.18 for the pro rata premium of \$23007.65 detailed above as compared with our charge of 85c, including blasting, collapse and underground damage in the P.D. Our 85c by the way is broken down as follows:

Actual Payroll	Element in Policy Rate	Policy Premium
\$1,055,214.02	M. & C. P. L. .50	\$ 5276.07
	M. & C. P. D. .25	2638.04
	Auto P. L. .08	844.17
—	Auto P. D. .02	211.04
	Total .85	\$ 8969.32

It seems to us that there is quite a favorable comparison with Manual rates in the charge provided for under our policy. We do not think that anyone will hold that our rate was unreasonable in spite of rates that may have been used by any other company in replacing our coverage after our policy was cancelled at the Assured's request.

If we can work out a satisfactory solution to the problem of the Okes Construction Company, we believe that both we and Mr. Rowland will be perfectly willing to adjust the Lytle and Green policy on a pro rata basis in spite of its having been cancelled at the request of the Assured, the request having been brought about by Mr. Scadden.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:md

(Testimony of H. R. Northrup.)

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

J. M. Haines, President

H. Lloyd Jones, Vice President

V. B. Chittenden, Vice President

C. R. Newhouse, Vice President

J. R. Robinson, Vice President

J. F. Cunningham, Secretary and Treasurer

D. W. LaRocque

Supt. Compensation & Liability Dept.

December 16, 1942

Mr. H. R. Northrup

Chief, Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th & F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company, et al Alcan Highway

Under date of November 24th I wrote you complying with your request for a breakdown of the manual premiums that would normally have applied for the exposures of this risk at the time we carried it, and the premium actually developed under our overall average rate for the comprehensive policy, which included automobiles. Our prem-

(Testimony of H. R. Northrup.)
ium was less than 40% of the developed manual premium on the same exposures. In other words, we discounted our rates considerably more than 50% so that our charge of 85% per \$100 of payroll does not seem at all out of line. We would appreciate your comments. We are anxious to get our earned premium settled out by the end of the year if possible.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 646935 Dec 18 '42.

[Letterhead Phoenix Indemnity Company]

January 4, 1943

Mr. H. R. Northrup
Chief, Insurance Section
Federal Works Agency
Room 5124
No. Interior Building
18th & F Streets, N. W.
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company, etal Alcan Highway

Please refer to our letters of December 16th and
November 24th and let us have your comments re-

(Testimony of H. R. Northrup.)

garding the current premium under this policy to the date of cancellation, August 31st.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 649922 Jan 5 '43.

February 19, 1943

Mr. D. W. LaRocque, Superintendent
Compensation and Liability Department
Phoenix Indemnity Company
55 Fifth Avenue
New York, New York
Re: Alaska Highway

Dear Mr. LaRocque:

I am leaving here for Canada and the west coast tonight to discuss a number of problems in connection with the Alaska Highway project, and immediately following my return to Washington within a week or ten days will be in a position to suggest a rate for the coverage provided by your company. I do not believe there will be any difficulty in your company and this office reaching an agreement as to a fair and adequate rate under the Comprehensive Insurance Rating Plan.

I expect to be in Seattle the latter part of next week and will get in touch with Mr. Rowland while there to learn if he can add anything to the information we already have. I am sure you would

(Testimony of H. R. Northrup.)

wish me to contact Mr. Rowland while on the west coast.

Trusting that this matter will be disposed of to the satisfaction of all concerned at a very early date, I am

Very truly yours,

H. R. NORTHRUP

Chief, Insurance Section

Copy to: Mr. I. C. Rowland

HRN/kdl

[Letterhead Phoenix Indemnity Company]

February 19, 1943

Mr. H. R. Northrup
Chief, Insurance Section
Federal Works Agency
Room 5124
No. Interior Building
18th & F Streets, N. W.
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company Alcan Highway

This case is more or less tied up with the Okes Construction Company in that both coverages related to the same project but two different sections, and Okes involved Compensation, whereas this involves only the Comprehensive Liability including Automobile. We have not had any reply to our letter of January 4th, which in turn followed

(Testimony of H. R. Northrup.)

up earlier letters. There has been no payment of any earned premium to us, although the earned premium on a short rate basis amounts to \$16,-153.73, which has been billed to the Assured. Short rate cancellation seems to be in order in view of the fact that the policy was not cancelled by the Insurer, but rather at the request of the Insured after insistence by the P.R.A. that the Insured effect cancellation.

We understand Mr. Scaddon has been trying to communicate with Mr. Rowland on the subject, but as Mr. Rowland is absent from Tacoma and is not expected back for three or four weeks, perhaps we can get together with you on it at the same time we attempt to bring the Okes Construction matter to a conclusion.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 666195 Feb 20 '43

(Testimony of H. R. Northrup.)

[Letterhead of Phoenix Indemnity Company]

March 9, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th & F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: C-161550 Oakes Construction Co. etal.

CLP-1750—Lytle & Green Construction

Co. Alcan Highway

On February 19th you informed us that you were leaving for the West Coast but would be back in about a week or ten days. At that time you expected to be in a position to discuss with us the question of rate under the Okes Construction policy and the payment of premium under both of these policies. Incidentally, as the Lytle & Green risk now stands, it has been cancelled short rate on our records and the earned premium amounting to \$16,-153.73 remains unpaid.

I hope by now you have returned and are in a position to discuss these two risks. I would appreciate hearing from you. If it is necessary that I go to Washington to make a last attempt to straighten things out, I will do so upon hearing from you. On the other hand, you may be making plans to come to New York on other business in

(Testimony of H. R. Northrup.)

the near future, and we could then get together here.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 670734 Mar 11 '43.

[Letterhead of Phoenix Indemnity Company]

April 12, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th and F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: C-161550—Okes Construction Company,
etal. CLP-1750—Lytle & Green Construc-
tion Co. Alcan Highway

Since our phone conversation of the other day, I have re-figured this on the basis of the tentative proposal you advanced of a \$6.00 rate, with the War Risk Plan applied. Your figure of a standard premium was \$59,212, and you had also thought that that would develop an actual premium within the maximum. I am wondering if in working that up you overlooked the estimated allocated loss expense of \$4000. Using a \$6.00 rate, our computations would be as follows:

(Testimony of H. R. Northrup.)

	Actual Payroll	\$984,050.00
6.46*	Proposed Overall Rate	6.00
63,569.63*	Proposed Standard Premium	59,043.00✓
57,212.67*	90% of Standard Premium	53,138.70✓
	Fixed Charge (17.9%)	9,511.83✓
	Actual Incurred Losses (excluding allocated loss expense).....	40,947.00
	Loss Conversion Factor	1.12
	Converted Losses	45,860.64
	Estimated Allocated Loss Expense....	4,000.00
	Total Losses Includable	49,860.64
	Indicated Premium	53,372.47
	Maximum Premium	53,138.70
	Tax Factor	1.029

* Marginal notation in pencil.

Applying the tax factor to the actual indicated premium, we arrive at \$61,094.27. Applying the tax factor to the maximum of 90% of the proposed standard standard premium, we get \$54,679.72.

I suggested in the course of our phone conversation that you consider approving a higher rate but with a lesser fixed charge percentage-wise that will result in our getting no more than \$9511.83. I would at least suggest that you consider approving a rate high enough to keep our indicated premium within the maximum, and then I think we can reach some agreement quickly.

As far as Mr. Rowland is concerned, a standard premium of \$59,043, would give him as an advisor's fee, to be paid separately and directly by the F.W.A., \$2412.77. This is based on 7½% of the first \$10,000, 4% of the next \$40,000, and 2% of the remaining \$3138.70. If a standard premium higher than \$59,043 is agreed upon, the advisor's

(Testimony of H. R. Northrup.)

fee will be of course proportionately higher, and I hope that we can work that out with Mr. Rowland. The main stumbling block seems to be to get approved a rate that will give us a developed premium within the maximum.

I will arrange to be in your office on Wednesday, April 21st, for further discussion of this matter in the hopes that we can come to a definite agreement at that time. I am sure we will be able to work out something that is acceptable all around. Unless I hear from you to the contrary, therefore, I will be in your office at say 11:00 A.M. next Wednesday, April 21st. Would you mind confirming it so that I will be sure that you will be there?

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 678621 Apr 14 '43.

(Testimony of H. R. Northrup.)

[Letterhead of Phoenix Indemnity Company]

March 25, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th & F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: C-161550 — Okes Construction Company,
etal. CLP-1750—Lytle & Green Construc-
tion Co. Alcan Highway

We have not heard from you since our letter of March 9th, and are wondering if you are yet in a position to discuss with us the question of rate and premium collection under these policies.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamped]: 674285 Mar 26 '43.

(Testimony of H. R. Northrup.)

April 14, 1943

Mr. D. W. LaRocque, Superintendent
Compensation and Liability Department
Phoenix Indemnity Company
55 Fifth Avenue
New York, New York

Re: C-161550—Oakes Construction Co. etal.
CLP-1750 — Lytle & Green Construction
Co. Alaska Highway

Dear Mr. LaRocque:

Thank you for your letter of April 12. I expect to be in Washington on Wednesday, April 21, and shall look forward to seeing you in my office at 11 o'clock that morning.

I had in mind using a rate of \$6.46 for the Okes Construction Company workmen's compensation coverage, and I believe from your letter that we should have no difficulty in arriving at something acceptable to all parties concerned.

With reference to the Lytle & Green Construction Company, I am now awaiting certain additional information from the field which I hope to have by the time we meet in Washington next week.

Looking forward to seeing you, I am

Very truly yours,

H. R. NORTHRUP

Chief, Insurance Section

HRN/kdl

(Testimony of H. R. Northrup.)

April 30, 1943

Mr. D. W. LaRocque, Superintendent
Compensation Liability Department
Phoenix Indemnity Company
55 Fifth Avenue
New York, New York

Re: Lytle and Green Construction Company
—Alaska Highway

Dear Mr. LaRocque:

When you were in my office last week I stated I was securing the actual payrolls of the above for the period from June 17, 1942 to August 31, 1942. This information has now been received and I find the Public Roads Administration records show that the total payroll for the period referred to amounted to \$3,745.00, so, it is evident there is some error in your records showing a payroll of \$1,055,214.02.

We will appreciate any further information you can give so that this matter may be disposed of. I am sending a copy of this letter to Mr. Rowland and might add that I expect to be in Seattle within a few weeks, going there by way of Edmonton, the Highway headquarters for Public Roads Administration. If desired, I will be glad to discuss the matter with Mr. Rowland when in Seattle and if there are any points in question, to take them up while in Edmonton. So, if there is any ques-

(Testimony of H. R. Northrup.)

tion as to the correct payroll I will appreciate hearing from you or Mr. Rowland.

Yours very truly,

H. R. NORTHRUP

Chief, Insurance Section

HRN:lms

cc: Mr. Rowland

Hansen and Rowland, Inc.

Tacoma, Washington

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

June 8, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Rm. 5124 No. Interior Bldg.

Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company. Alcan Highway

You will recall this case that we discussed when the writer was in your office about six weeks ago. Our Comprehensive Liability policy had been in force from June 17th to August 31, 1942, and our audit had developed a payroll of \$1,055,214.02. However, you had been furnished information to the effect that the payroll for that period amounted to only \$3745. We have in our files certified copies

(Testimony of H. R. Northrup.)

of payroll statements from the Assured, and we also have a photostatic copy of a recording machine tape secured from the Seattle office of the Public Roads Administration, showing payrolls for part of that period, which tie in with the amounts that had previously been given our auditor. These payroll records seem to represent items that were reimbursed to Lytle & Green as payroll by the Public Roads Administration. The records were prepared by Government auditors. This particular part of our file covers the period from June 17th to July 15th, during which time the payroll amounted to \$309,821.42. Altogether, our re-check discloses the same payroll of \$1,055,214.02 as was previously reported to us.

There seems to be no doubt but that these were actually Lytle & Green's payrolls. You may have had a chance to look into this question while you were out West on your recent visit, and we would like very much to have your early advices.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

(Testimony of H. R. Northrup.)

Copy /db

July 9, 1943

Mr. D. W. LaRocque, Superintendent
Compensation & Liability Department
Phoenix Indemnity Company
55 Fifth Avenue
New York, New York

Re: CLP-1750 — Lytle & Green Construction
Company. Alaska Highway

Dear Mr. LaRocque:

The question of payroll for the above referred to in your letter of June 8 is still being investigated. The only records we have show that the payroll of this concern under the above policy amounted to \$3,745, and apparently any amount in excess of that was reported in error.

As stated, the matter is being given further attention, and if not disposed of within the next two weeks, I will have an opportunity of discussing it personally with the contractor's representatives and Public Roads Administration representatives at the scene of operations as I expect to be at the scene in about two weeks. In the meantime, rest assured that we will do everything possible to satisfactorily dispose of the question of premium due for the time your company covered this risk.

Very truly yours,

H. R. NORTHRUP,

Chief, Insurance Section.

HRN/kdl

(Testimony of H. R. Northrup.)

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

August 4, 1943

Mr. H. R. Northrup, Chief
Insurance Section
Federal Works Agency
Rm. 5124 No. Interior Building
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction
Company

We have had no further word from you since your letter of July 9th in which you stated that you expected to discuss this mix-up personally with the contractor's representatives and the Public Roads Administration at the scene of operations sometime during the latter part of last month. Meanwhile, it has occurred to us that perhaps your figure of \$3,745, which you claim represents the entire payroll that should be used for premium computation under our policy is only the payroll for Lytle & Green, the general contractors. That still does not agree with our own records of Lytle & Green's payrolls, but, aside from that, the fact remains that our policy covered an imposing list of associate and sub-contractors, the aggregate payrolls for which amounted to the figure of \$1,055,-214.02, on which we base our claim for premium, and incidentally, on a short rate basis inasmuch as

(Testimony of H. R. Northrup.)

this was not cancelled by us but instead at the Assured's request upon the insistence of Mr. Scadden.

Lytle & Green's payroll for the last two weeks of July, 1942 alone amounted to \$12,281.53, and for other periods during the time our policy was in force varied in amount from a few hundred dollars to as much as \$10,000 or \$11,000 each period. That is just for Lytle & Green payroll, not the payroll of the various other associate and subcontractors specifically covered by name and reference in our policy. Lytle & Green's payroll for the total period of our policy coverage was approximately \$58,000. You have the complete breakdown, which I left with you, and we have certified copies of the various payroll statements for the different periods, in our files.

We would appreciate your letting us know where the matter stands at present.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Endorsed]: Filed Sept. 6, 1944.

The Court: I think we will take an intermission now for fifteen minutes.

(Recess.) [89]

The Court: You may proceed.

Q. Mr. Northrup, can you tell us about when it came to your attention that this pay roll was the

(Testimony of H. R. Northrup.)

pay roll of Civil Service appointees paid by Government check? A. In late February, 1943.

Q. Now, during the period covered by this correspondence between you and Mr. La Rocque, with respect to Lytle and Green coverage, what were you negotiating about, or discussing?

A. The rate and the premium produced by the——

Q. On the Lytle and Green insurance?

A. Yes, sir.

Q. At the time of the cancellation of the Lytle and Green contract, was there some other coverage put on? A. Yes, sir.

Q. And what was the rate under that coverage?

A. It started at seven and one-half cents per \$100.00 of pay roll, but later it was changed to four cents, as of the inception date of the policy—four cents per \$100.00 of pay roll.

Mr. Sager: You may inquire.

Cross Examination

By Mr. Peterson:

Q. On this other insurance that was placed by the General Casualty Company of America—the United, rather——

A. United Pacific Insurance Company of Tacoma, here.

Q. And that was the public liability and property damage you are referring to?

A. Public liability and property damage caused by automobiles. [90] No other property damage.

(Testimony of H. R. Northrup.)

Q. It was limited to property damage caused by automobiles? A. Yes, sir.

Q. That was at seven and a half cents?

A. At the beginning, and later changed.

Q. And against eight and a half cents on the Phoenix? A. Eight five oh on the Phoenix.

Q. Do I understand it was seven and a half or seventy-five? A. Seven and a half cents.

Q. Well, the United Pacific took over all contracts, all the insurance up there, did they?

A. Yes, sir, eventually.

Q. Now, that seven and a half cent rate was based on the pay roll?

A. Yes, it applied for \$100.00 of pay roll.

Q. That included men working out on the job, and mechanics, truck drivers and so on?

A. Yes, sir, but only for public liability hazard.

Q. I understand, only for public liability, so that that was just an extension of this coverage of the Phoenix, at a lesser rate?

A. That is correct, yes, sir.

Mr. Peterson: Yes.

The Court: Let me ask here, were those Civil Service employees, the ones you designated Civil Service employees, did it cover them?

A. No, sir. I might explain, Your Honor, that the same error was made. A pay roll was reported to the United Pacific when they first took this coverage over,—pay roll on Civil Service employees, but when that was [91] discovered a credit memorandum was issued and we paid only at the four

(Testimony of H. R. Northrup.)

cent rate by that time on the actual Lytle and Green pay roll, and eliminated all federal government employees.

Q. Well, now, the four cent rate, when was that put into effect?

A. I don't recall the exact date. I could dig it out, if you wish, but it was dated back to the inception date of the policy.

Q. Well, and then did you pay a premium based on the four cent rate on the employees on the pay roll?

A. Only the pay roll of Lytle and Green. We only on the pay roll of Lytle and Green at all times.

Q. Did you cover the other contractors?

A. No, sir, the government cannot—on the other contractors, yes, sir.

Q. The policy—

A. When I say Lytle and Green, I do not want to mislead. I mean by that Lytle and Green and all associated contracts.

Q. And that is what I wanted to get at, and that was the four cent rate was paid on those, is that correct?

A. Yes, sir.

Q. And that was the pick-and-shovel men, tractor men, graders and machine operators, and some on automobile operators?

A. I don't believe there were any such, the strictly contractors' employees, either Lytle and Green, or Oslin and others were more in the managerial capacity. All of the laborers and tractor

(Testimony of H. R. Northrup.)

operators and so forth were [92] federal government employees.

Q. That federal government business, that is your term, they were these men signed up for Civil Service because the government could not pay them direct. That was the reason?

A. I don't know the reason.

Q. That was abandoned?

A. At the end of the 1942 season.

Q. A man getting a job up there didn't have to sign up for this Civil Service business any longer?

A. That is correct.

Q. And they continued on. There wasn't any change in the arrangements up there, as far as that was concerned after 1942, in carrying on the work?

A. Well, except that they were an entirely different type of employee. They were no longer Civil Service employees. They became contractors' employees, Okes, and——

Q. And you paid on the pay roll these men received? A. Yes.

Q. And that included the man who was working pick and shovel, and driving trucks and so on?

A. Yes, the second season.

Q. And the work was carried on the same way after '42 as it was before '42, isn't that a fact? I mean, the actual doing of the work?

A. Well, now, I must say that I was not up along the line of the highway, but from an insurance standpoint there was quite a difference.

(Testimony of H. R. Northrup.)

Q. Well, you don't know whether there was any change in the manner and method of doing the work after '42 as prevailed [93] before?

A. I have no knowledge of that.

Q. You don't know anything about that, but you did have coverage for the negligent accidents and omissions of any of these workmen on the job after '42 from the United Pacific Casualty Insurance Company?

A. Yes, sir.

Mr. Peterson: I think that is all.

The Court: Well, in 1942, the various employees, common laborers and others, received their pay from whom?

A. The federal government.

The Court: Payment was made direct by the federal government the same as it would to any other Civil Service employee?

A. Yes, sir.

The Court: And Civil Service deductions were made, and Civil Service rights were in existence?

A. I am not thoroughly familiar with that. I think Mr. Sager may have some one that can testify, but I am inclined to believe that the usual five per cent deductions were not made, because these were different types of Civil Service time, the regulars that retired, certain others for war emergency, other—I am not certain what it is called, a temporary basis, laborers and so forth.

The Court: Who employed these laborers in '42?

A. Representatives of the federal government, necessarily. No one but a federal government [94]

(Testimony of H. R. Northrup.)

representative could employ a Civil Service employee.

The Court: Who could discharge them?

A. A representative of the federal government.

The Court: Did they have the same rights of any other Civil Service employee with regard to a discharge hearing, and——

A. I don't know. They got annual leave and the like, the same as others. I believe Mr. Sager will have some one that can give more information.

Mr. Sager: I think probably Mr. Northrup is not too familiar with that. We have a witness who is.

The Court: That is all.

By Mr. Peterson (Continuing):

Q. The coverage, I understand, of the United Pacific, was not as broad as the Phoenix?

A. Oh, it did not include property damage other than automobile, but that is one of the things that I would have ironed out with the Phoenix if we had ever settled this thing and suit had not been filed, because I had a similar situation on another company. We don't want property damage insurance. In fact, there was no hazard.

Q. It was not as broad coverage as the Phoenix had provided?

A. No, a very slight difference.

Q. Now, pay checks, after the Civil Service proposition was abandoned, was made direct—it was made by the government direct to the workmen?

A. I believe so, as a matter of convenience.

(Testimony of H. R. Northrup.)

Q. Well, it was a matter of convenience before, wasn't it, as far as you knew there wasn't any change in the method [95] of paying the men after Civil Service was abandoned as there was before? They got their checks right through to the completion of the job right from the government direct?

A. That is true, but to give you the proper picture I think I should say—

Q. I am not asking for a picture. I am asking for facts.

Mr. Sager: He is entitled to explain his answer.

Mr. Peterson: It does not seem to me the answer calls for an explanation.

The Court: If you have any more to say, you can.

A. I was merely going to point out that paying direct was the general practice followed in connection with all the contractors. We paid the insurance company cost direct for the contractors' insurance, purely as a matter of convenience.

The Court: Well, you mean if there had not been a dispute arisen here, the premium here would have been paid by government check?

A. Undoubtedly, yes, sir.

The Court: Upon the certificate of the assured?

A. I believe there was a certificate involved, yes, sir. Well, he would have to say he had the coverage. We knew we handled all of that, and the assured had very little to do with it.

(Testimony of H. R. Northrup.)

Mr. Peterson: I think the matter of payment is covered by the contract itself, Your Honor. The contract [96] provides that the contractor——

The Court: It does not. The contract provides the assured is liable.

Mr. Peterson: Yes. And the government at its option may pay direct.

Mr. Sager: That is not a provision of the insurance contract. That is a provision of the construction contract. I will put it in evidence later.

The Court: I was looking at the insurance contract. I did not find anything in the insurance contract which made the government liable for premiums.

Mr. Peterson: No, Your Honor. That is all.

Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, I want to get straightened out the situation with this premium on the later coverage that was with United Pacific Insurance.

A. That is correct.

Q. That took effect at the same time this was cancelled?

A. The minute it was cancelled.

Q. Or the premiums with Phoenix were cancelled, and originally, do I understand, the premium was at the rate of seven and a half cents a hundred dollars of pay roll?

A. The policy was written showing that rate.

Q. And it was later reduced to four cents a hundred dollars?

A. Yes.

Q. Now, then, you stated in submitting the pay

(Testimony of H. R. Northrup.)

roll to the United Pacific, that the same error was made as with Lytle and Green, and that they reported the entire pay [97] roll, whether they were Civil Service employees or not? A. Yes, sir.

Q. And when that fact was discovered, that was changed, a refund or a credit or something was allowed upon the premiums charged? A. Correct.

Q. And under the revised premium, it covered only those paid by the contractors and not by government check? A. That is correct.

Q. At least it covered only those not under Civil Service?

A. Yes, we did not pay for any under Civil Service.

Q. So that the premium which had been computed up to that time and which was based upon the pay roll of Civil Service employees, was remitted, or a credit was allowed for it and the premium was not paid upon those Civil Service employees? A. That is correct.

The Court: That is, for the year 1942?

A. Yes, sir.

The Court: And then there was a change in the method of operation for the year 1943?

A. Yes, sir, '43 they went on a contractor's pay roll, just like all the others had been.

Q. Well, Mr. Northrup, isn't it a fact with respect to Lytle and Green, that they were not removed from Civil Service until some time after the first of the year, or do you know?

(Testimony of H. R. Northrup.)

A. It is my understanding that at the beginning of the second season, all employees rehired for the second season, were hired by Lytle and Green and put on Lytle and [98] Green's pay roll. Now, there was a definite break there when winter came on for the majority of the employees. When they came back the next season they went on Lytle and Green's pay roll. There was a few carried through the winter, just when the change was made I am not certain, but the first of the year or February 1st of '43.

Mr. Sager: I think that is all.

Recross Examination

By Mr. Peterson:

Q. Who hired the men employed by Lytle and Green, unit contractors, beginning with June 17th, 1942?

A. I don't know of my own knowledge. I have heard.

Q. Now, I think in answer to a question by the Court, you indicated that there was some change in the operation. What did you mean by that, any change in carrying on the work, any change on who directed the men to do their respective jobs?

A. I don't recall saying there was any change in the operations. Do you refer to my statement that in the next year, the second season, these employees were handled the same as had been handled, all other contractors' employees? I made that statement.

(Testimony of H. R. Northrup.)

Q. I am not clear yet as to what happened in '43, when you invoked, inaugurated four cent rate in '43, and the Civil Service proposition was discontinued, then what did the contractors pay on so far as pay roll was concerned?

A. After they ceased to be Civil Service employees?

Q. Yes. [99]

A. We paid the four cent rate on the entire pay roll.

Q. On the entire pay roll, so there is no misunderstanding about that, now, that is on the pick-and-shovel men, and everybody who worked on the job?

A. That is correct.

Q. That is correct? A. Yes, sir.

Q. Now, this policy is what they call a comprehensive, that the United Pacific issued,—is what they call a comprehensive rating plan coverage?

A. Yes, sir. We should not get confused here. The comprehensive liability policy and the comprehensive rating plan of the Federal Agency—we do have all of the coverage of the United under your comprehensive rating insurance plan.

Q. Now, tell us just briefly. I will ask another question first. The United Pacific was under the comprehensive rating plan, is that correct?

A. Yes, sir.

Q. Will you tell the Court very briefly how that differs in the mechanics of the thing from the policy which the Phoenix issued in this case?

A. It results in the government paying a prem-

(Testimony of H. R. Northrup.)

ium amounting to the losses actually paid to the men there or their widows, or to the public that might have been injured, plus a factor for the claim department's service of the insurance carrier, plus certain fees to the insurance carrier for writing the policy, making inspections—things of that sort, and in some instances a fee to an advisor. When we get all through, we take the money paid [100] out and add to that reserved for future payments in the case of a case in controversy in court, or something of that sort, and total it all up—add these various factors of expense, and that is our cost.

Now, for convenience, we have started off in writing the policy at a certain rate, and we pay the insurance carrier a premium—a deposit premium of fifteen per cent of what the estimated premium is. That is, at the inception of the policy. Then, as the pay roll reports come in every month from the contractor, we multiply the actual pay roll by the rate shown on the policy and pay the insurance carrier fifty per cent of that, so when the job is done if the estimated pay roll is exactly right, and it is never, the insurance carrier would have received sixty-five per cent of the premium shown in the rate in the policy, and we start adjusting if that is more money than they received, we pay the difference, however not to exceed ninety per cent of the premium produced by the rate shown on the policy.

(Testimony of H. R. Northrup.)

Q. Now, on that plan—that comprehensive rating plan really is writing insurance on the cost plus proposition, isn't it?

A. I think that is a good description.

Q. It means that you, for instance, you have a comprehensive policy—a policy under the comprehensive plan, and you had a loss up in Dawson Creek for instance, and——

A. We did not have that. It was the War Department.

Q. You knew of it, however?

A. Yes. [101]

Q. A barge loss. We will say a loss occurred where you had a comprehensive policy, so we will get it clear, and it amounts to \$100,000.00, like the Dawson Creek loss. Now, exactly how is that proposition handled? Who pays out the money first to the man who got injured, who suffered the loss?

A. The insurance company pays the man or his widow, or the outside public, if it happened to be public, and make monthly reports.

Q. They pay that out now? A. Yes.

Q. And at the end of the month, what do they do? A. They make quarterly reports.

Q. At the end of the period?

A. Yes, sir, they make reports—term reports to the federal department concerned, Federal Works Agency, or War Department. All government departments use the same plan, and frankly we do not pay a lot of attention to those quarterly

(Testimony of H. R. Northrup.)

reports, because I have cases right now where the reserves are entirely too high on some outstanding cases. It is not costing the government any money in making the preliminary adjustment after the job is completed, and more particularly making the final adjustment is where we are vitally concerned of the costs made by the carrier. We scrutinize to see they have not put in any fictitious cases or reserves.

Q. I want to get to the \$100,000.00 the company paid out on this assumed loss? A. Yes.

Q. When does it get its money back on that? Does it get [102] the money back from the government?

A. You have to be a little more specific, I think, Mr. Peterson. That carrier would have collected the premium as it went along. Now, if the job were completed we will say they would have collected 65 per cent, approximately of the premium shown on the policy.

Let's assume that that premium would total \$100,000.00,—the pay roll times \$100,000.00 and your loss in this case, we will assume, was \$100,000.00. The carrier, if everything worked smoothly, would have received \$65,000.00,—do you follow me, or 65 per cent. Now, then, when the final adjustment was made, if the War Department in that case was satisfied that the \$100,000.00 was actually spent——

Q. Yes.

A. They would pay the insurance carrier the

(Testimony of H. R. Northrup.)

difference between the \$65,000.00 already paid and \$90,000.00 which is the top limit of our liability for premium.

Q. Yes.

A. We have a 90 per cent limit. And anything above that the carrier stands.

Q. Let's reduce that situation down to \$50,000.00. Does the ten per cent differential still apply? A. Oh, yes.

Q. If I understand you correctly, premiums are paid, and then when a loss occurs, and in the final adjustment of the matter the government pays to the insurance carrier the difference between the amount of premiums paid, and the loss, less 10 per cent of the face of the loss, is that it? [103]

A. No, sir, no. The 10 per cent comes in only where you hit your maximum.

Q. Oh. A. We do not have any deductible.

Q. Then, if your maximum is \$100,000.00, then on a \$50,000.00 loss, 10 per cent would not become operative?

A. No, we would pay the insurance carrier in that case \$50,000.00.

Q. You pay him so he is made whole?

A. Yes, sir.

Q. Then in addition to that, you allow him a fixed fee of some kind for carrying the risk?

A. Yes, sir.

Q. Yes, and that is the kind of a policy the United Pacific wrote you? A. Yes, sir.

(Testimony of H. R. Northrup.)

Q. And that is the kind of a policy on which these fees were paid—these premiums were based?

A. Yes.

Q. Yes. On the other hand, with a policy like the Phoenix, if a loss occurred then the matter of the loss is up to the contractor and the insurance carrier to take care of, without any chance of reimbursement from the government?

A. Well, the policy as it stood, did not have the plan so—the 85 cent rate multiplied by the pay roll was just the money that the Phoenix took and held, and if they did not pay a penny, they did not have to return anything to the government.

Q. I just want to get it clear, the difference between the two policies. [104]

A. That is correct. In other words, that is the reason we insist on a comprehensive form. We save money.

Q. Yes, and you insist on the comprehensive plan scheme because you think that is more advantageous to the government?

A. Oh, we know it is, yes, sir.

Q. Yes, and this fixed fee,—I don't want to ask about any specific case, but do you happen to have in mind the fixed fee that was paid to the United Pacific in this matter, the rate?

A. The coverage has not been settled yet. In other words, that will come in at the time of the final settlement.

Q. That is comparable to the fixed fee which the contractor gets for his job, isn't it? It works pretty much on the same basis?

(Testimony of H. R. Northrup.)

A. Oh, I can see differences there. I don't know that I could agree on that. There is a sliding scale, the bigger the job, the less percentage of fee goes to the carrier, and in the United Pacific case, I consolidated all policies, Okes, Lytle, Green, Dowell, and all the others by a connecting endorsement, so in the end we will pay them the lower fee, based on the total, some million and a half dollars probably, of cost, whereas, if we had a lot of separate policies we would have a higher fee on each one, but we worked that out with them and get the benefit.

Q. I understand, so that if a loss for instance occurred under the United Pacific Casualty, which is below the limits, and we will say the limit is \$100,000.00—I don't know what it is, but we will just assume that a [105] loss occurs and the aggregate of the losses are below that amount, and it collects \$50,000.00 of premium, and the losses we will say are seventy-five thousand, then the government would reimburse the twenty-five?

A. Do I understand you to say they collected fifty thousand and the amount of the losses were seventy-five?

Q. Yes, and its limit under the policy was a hundred thousand?

A. Well, the limit under the policy would have no bearing on the premium. In other words, we insist on fifty and one hundred thousand limits, which is the amount of coverage, \$50,000.00 for one person injured or killed in an accident, or \$100,000.00 if

(Testimony of H. R. Northrup.)

any number is killed in the same accident. That has nothing to do with our cost.

Q. It does have to do with reimbursement if the loss is less than the limit, doesn't it?

A. I don't quite follow you there. You have mentioned \$50,000.00 collected by the carrier. Well, now, are you talking about \$50,000.00 representing the premiums shown in the policy? If you take your pay roll, times your rate, you produce \$50,000.00.

Q. How are the premiums paid on this United Pacific, monthly?

A. Monthly, yes, sir.

Q. And if the pay roll is we will say \$100,000.00 a month, what is the premium they get monthly?

A. The hundred thousand dollar pay roll multiplied by the rate shown in the policy, divided in half.

Q. All right, tell us what the amount would be in dollars? [106]

A. Well——

Q. On the rate.

A. \$100,000.00—are you speaking now of public liability or compensation?

Q. No, about public liability.

A. It is four cents a hundred, \$100,000.00——

Q. Well, four cents times a hundred thousand, isn't it?

A. Yes.

Q. And—— A. Divide it in half.

Q. Well, then, that is two cents, is that it?

A. Yes, it is equivalent to two cents.

(Testimony of H. R. Northrup.)

Q. All right, so there isn't much use of talking about four cents, then? A. Well, yes.

Q. Why?

A. The four cents is the top limit, and they can go up to 90 per cent of that.

Q. Oh, that is the top limit, I see.

A. We guarantee it won't cost more than 90 per cent of——

Q. What is your minimum guarantee?

A. No minimum. If we have no losses, we pay nothing but a little fee.

Q. What is the fee, that is what I want to get at?

A. I can't tell you offhand. Mr. Rowland has copies of the plan. I haven't one with me. The fee in this case will be in the neighborhood. I think, of six per cent of the premium produced by the rate shown in the policy, because we consolidated all this. It runs all the way from 37 per cent on a small case down. [107]

Mr. Peterson: Oh, I think that is all.

Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, was this the plan you were trying to get Lytle and Green to come under?

Mr. Peterson: We object to that as immaterial, something he was trying to get somebody to do.

The Court: Objection sustained.

Q. Is this fee that goes along with this policy, is that a part of the premium that is produced by the rate times the pay roll, or is that in addition to the rate?

(Testimony of H. R. Northrup.)

A. It is a part of the premium. In other words, we multiply the rate in the policy by the actual payroll and get a premium, and our total responsibility for money payment cannot exceed 90 per cent of that, and excludes the actual money paid to the injured people for death, medical expenses, all expenses of the carrier, fixed fees, claim expense, state taxes if there are any, all added together up to 90 per cent. I make one exception, the state tax will be in addition to the 90 per cent, but we had no state tax on this.

Q. And that is all included in this premium, which in the case of the United Pacific or on this same coverage was four cents per \$100.00?

A. That is right.

Q. And if their losses exceed that 90 per cent of the premium produced, they take the loss?

A. Oh, yes; yes, sir.

Mr. Sager: I think that is all. [108]

Mr. Peterson: That is all.

(Witness excused.)

Mr. Peterson: Your Honor, I notice it is about 4:30. I want to ask the indulgence of the Court. I am in this case on probation, and I want——

The Court: I understand pretty well. We will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock A. M., September 7th, 1944.)

[109]

September 7th, 1944.

10:00 O'clock A. M.

The court met pursuant to adjournment; all parties present.

The Court: Now, you may proceed.

Mr. Sager: At this time, Your Honor, I will offer in evidence certified copy of the contract between the defendant companies and the government.

Mr. Peterson: No objection.

The Court: It will be admitted in evidence.

(Whereupon, certified copy of contract referred to was then received in evidence and marked Defendants' Exhibit A-6.)

DEFENDANTS' EXHIBIT A-6

CONTRACT No. WA4pr-14299

Alaska-Canada Highway Project No. 3

Fixed-Fee

Engineering-Management Contract

Public Roads Administration

Project Manager and Address: C. F. Lytle Company, Sioux City, Iowa, and Green Construction Co., Des Moines, Iowa.

Contract For Engineering Management Services In The Construction Of Alaska-Canada Highway Project No. 3.

Location: From a point on the international boundary line between Canada and Alaska to a point near Slana, Alaska, approximately 155 miles, designated Sections A-1 and A-2 as shown on "Plan of

Defendants' Exhibit A-6—(Continued)

Operation" prepared by Public Roads Administration.

Fixed Fee: Sixty-seven thousand, two hundred dollars (\$67,200.00)

Estimated Construction Cost Exclusive Of Fixed Fee: Eight million, four hundred thousand dollars (\$8,400,000).

Payment: To be made by Regional Disbursing Officer, United States Treasury Department.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following funds, the available balances of which are sufficient to cover the cost of the same.

8002/35902.002 Working Fund, Federal Works Agency, Public Roads Administration (Engineer Services, Army) 1942-43

Fixed-Fee Engineering-Management Contract

This Contract, entered into this fourth day of May, 1942, by the United States of America (hereinafter called "The Government") represented by the Contracting Officer executing this contract, and C. F. Lytle Company, a corporation organized and existing under the laws of the State of Iowa, and of the city of Sioux City, Iowa, and the Green Construction Co., a corporation organized and existing under the laws of the State of Iowa, and of the city of Des Moines, Iowa, acting jointly for the purpose, (hereinafter called the Project Manager).

Witnesseth:

Whereas, the Government has agreed to engage

Defendants' Exhibit A-6—(Continued)

the Project Manager to perform the services hereinafter set forth, under the general terms and conditions expressed in letter of April 29, 1942, from said Project Manager to the Commissioner of Public Roads and letter of April 30, 1942, from the Commissioner of Public Roads to said Project Manager, which said letters are by reference made a part hereof; and

Whereas, the performance of said services under a fixed-fee contract entered into after negotiations approved by the Commissioner of Public Roads, and without advertising for bids, is authorized under Executive Order No. 9001 as extended by Executive Order No. 9023; and

Whereas, the parties hereto desire that the general terms and conditions set forth in said letters of April 29 and 30, 1942, be expressed in detail and the intention of the parties more clearly defined by entering into a more formal fixed-fee contract for the performance of said services:

Now, Therefore, the parties hereto do mutually agree as follows:

Article I - Statement of Work

1. The Project Manager shall, in the shortest possible time, furnish engineering-management services to assure the satisfactory completion of the construction of a portion of the Alaska Highway from a point on the international boundary line between Canada and Alaska to a point near Slana, Alaska, a distance of approximately 155 miles, des-

Defendants' Exhibit A-6—(Continued)

ignated as Sections A-1 and A-2 as shown on the "Plan of Operation" prepared by and on file with the Public Roads Administration.

2. The Project Manager shall, in accordance with the provisions of this contract, provide the following engineering-management services, subject at all times to the direction and approval of the District Engineer of the Public Roads Administration:

(a) Select a representative satisfactory to the Public Roads Administration, such representative being hereinafter designated and referred to as "General Manager," who shall have general direction and supervision of the work.

(b) Recruit the services of an adequate number of competent and experienced contractors with sufficient equipment, machinery, skilled personnel and ability, with the aid of the Project Manager, to obtain necessary labor to perform the work required for the construction of said project. If the contractors thus recruited are satisfactory to the Commissioner of Public Roads, or his duly authorized representative, the Government will enter into a separate contract with each of them for the construction of such portion of the project, the furnishing of such labor, materials, supplies, equipment, and other appropriate services, as may be deemed necessary or desirable to insure completion of the project within the shortest possible time.

(c) Allocate portions of the work to be performed on the project to the individual contractors engaged under subsection (b) hereof, and shift the construction operations of the individual contractors from

Defendants' Exhibit A-6—(Continued)

place to place as necessary to achieve the most efficient and expeditious prosecution and completion of the work.

(d) Supervise and control the individual contractors with respect to the management of their operations, the work performed by them, the furnishing and handling of their equipment, and the supervision of the employment and discharge of their personnel.

(e) Maintain and operate a central office in the vicinity of the project where all records required by the Government shall be kept, and keep all records required by the Government, including but not limited to fiscal and cost accounts, personnel records, time reports, requisitions, purchase orders and such other records both for the Project Manager and the individual contractors as may be deemed necessary by the Commissioner of Public Roads or his duly authorized representative.

(f) Provide, maintain, and operate a central equipment repair depot, a central storage and supply depot, any requisite sub-depots and camps adequate to provide board and lodging for all personnel engaged to perform any work in connection with the project, and adequate sanitary, health and hospital facilities not otherwise provided in connection therewith.

(g) Provide adequate facilities for communication between all parts of the work and with representatives of the District Engineer, assigned to supervise and direct the work, and for transporta-

Defendants' Exhibit A-6—(Continued)

tion of supplies and equipment between the various parts of the work.

(h) Furnish for the consideration and approval of the District Engineer a chart showing the executive, administrative and other personnel, exclusive of labor, to be employed in furnishing management services for the project, indicating their duties and proposed salaries, and designating the individuals and salaries or portions thereof considered as part of the general overhead expenses. This chart shall be supplemented from time to time during the progress of the work so that it shall present, for the consideration and approval of the District Engineer, such revisions as are deemed necessary by the Project Manager.

(i) Furnish such other management services in connection with the work as may be required by the Commissioner of Public Roads or his duly authorized representative.

(3). It is estimated that the construction cost of the work covered by this contract will be eight million, four hundred thousand dollars (\$8,400,000.00) exclusive of all fixed fees, and that the work herein contracted for will be ready for utilization by the Government on or before December 31, 1942. It is expressly understood, however, that neither the Government nor the Project Manager guarantees the correctness of either of these estimates. The estimated cost set forth above is based upon the best data now available to both the Government and the Project Manager.

Defendants' Exhibit A-6—(Continued)

In consideration for his undertaking this contract, the Project Manager shall receive the following:

(a) Reimbursement for expenditures as provided in Article II.

(b) A fixed fee in the amount of sixty-seven thousand, two hundred dollars (\$67,200.00), which shall constitute complete compensation for the Project Manager's services, including profit and all general overhead expenses.

4. The Contracting Officer or his authorized representative may at any time, by written order and without notice to sureties, if any, make changes in or additions to the plans and specifications, issue additional instructions, require additional work on Sections A-1 and A-2, and order work on other sections of the highway in Alaska not mentioned above, or direct the omission of work covered by the contract. It is understood that the fixed fee is based on the estimated cost of the work specified in paragraph 1, Article I, of this contract. It therefore is agreed that any work not completed on Sections A-1 and A-2 by the end of the 1942 construction season because of any such additions or changes in plans and specifications or any requirement of work not contemplated by the plans for Sections A-1 and A-2 shall not prejudice the right of the Project Manager to the fixed fee under this contract and such unfinished work shall be covered by a new fixed fee to be agreed upon between the parties here-

Defendants' Exhibit A-6—(Continued)

to. If in the judgment of the Contracting Officer there is a substantial increase in the work estimated under this contract, an adjustment in the fixed fee may be made if it is determined by the Contracting Officer that an adjustment will be justified and will be within the authority of law. In no event shall such fixed fee exceed the limitation prescribed by law.

5. Title to all materials, tools, machinery, equipment and supplies the cost or value of which is to be reimbursed the Project Manager by the Government shall vest in the Government at such point or points as the District Engineer may designate in writing; Provided, That the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the District Engineer; Provided further, That upon such final inspection the Project Manager shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Project Manager shall be responsible for the removal of the rejected property within a reasonable time.

6. During the performance of this contract, the work shall be under the full-time resident direction of a General Manager selected by the Project Manager and approved by the Contracting Officer. In no event shall the Project Manager be entitled to reimbursement for any salary, wages, or like compensation for the direction of the work, whether

Defendants' Exhibit A-6—(Continued)
performed by an individual, a partner, a corporate officer or other representative, except as shown on the approved chart submitted in compliance with paragraph 2 (h) of Article I hereof.

Article II - Cost of the Work

1. Reimbursement for Project Manager's Expenditures. The Project Manager shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer or the District Engineer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use in the performance of the services required hereunder.

(b) All subcontracts made in accordance with the provisions of this contract. Provided, however, that regardless of the form of any subcontract, the fees or profits of any such subcontractor shall not be considered as a cost for which the Project Manager will be entitled to reimbursement.

(c) Such equipment rentals, and such repairs and repair parts as are not included in the rental of equipment from construction contractors and not made necessary by the fault or negligence of the Project Manager or his employees, reimbursement to be in accordance with the terms of the Equipment Rental Schedule of Public Roads Administration approved May, 1942.

Defendants' Exhibit A-6—(Continued)

(d) Transportation charges on materials and supplies.

(e) Transportation and traveling expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work; expenses of procuring labor and expediting the production and transportation of materials and equipment. Expenditures under these items must have the written authorization of the District Engineer in advance.

(f) Salaries of superintendents, timekeepers, foremen, and other field employees of the Project Manager in connection with the work. In case the full time of any field employee of the Project Manager is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person, other than a laborer or mechanic, shall be assigned to service by the Project Manager until there has been submitted to and approved by the District Engineer, a statement of the qualifications, experience and salary of the person proposed for such assignment. No compensation of such employees shall be reimbursed by the Government except in accordance with the salary schedules approved by the District Engineer for this work.

(h) Premiums on such bonds and insurance policies as the District Engineer may approve or require as reasonably necessary for the protection of the Government or the Project Manager.

(j) Payments from his own funds made by the

Defendants' Exhibit A-6—(Continued)

Project Manager under the Social Security Act, and any disbursements required by law, which the Project Manager may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel.

(k) If the General Manager and/or his representative shall be required to travel, the Government will reimburse the Project Manager for the transportation, including Pullman where necessary, and will allow for such travel six dollars (\$6.00) per day in lieu of all other expenses. Transportation by privately owned automobile on such required travel shall be reimbursed at the rate of five cents (\$.05) per mile per vehicle as representing the actual cost of such transportation. All such travel shall either be authorized or approved in writing by the District Engineer.

(1) Disbursements incident to the payment of pay rolls either of the Project Manager or the individual contractors, including but not limited to, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments to employees are made by check, facilities for cashing checks must be provided without expense to employees and the Project Manager shall be reimbursed therefor.

3. Government's Right to Make Direct Payments. (a) The Government reserves the right to pay directly to common carriers any or all freight charges on materials, equipment and supplies.

(c) The Government reserves the right to pay

Defendants' Exhibit A-6—(Continued)

directly to the persons concerned all sums due from the Project Manager for labor, materials, or other charges.

Article III - Payments

1. Reimbursement for Cost. The Government will currently, at the option of the Project Manager, reimburse the Project Manager for or pay directly to the persons concerned all direct costs incurred in accordance with Article II upon certification to and verification by the Contracting Officer of the receipted invoices and such other documents as the Contracting Officer may require. Generally, reimbursement will be made weekly, semi-monthly, or monthly as requested by the Project Manager.

2. Payment of the Fixed Fee. The fixed fee prescribed in Article I shall be compensation in full for the services of the Project Manager, including profit and all general overhead expenses. Eighty percent (80%) of the said fixed fee shall be paid as it accrues in monthly installments, based on the percentage of the completion of the work as determined from estimates made and approved by the District Engineer. Upon completion of the work and its final acceptance, any unpaid balance of the fee shall be paid to the Project Manager.

3. Payments by Project Manager. If bills for purchases or services of any kind incurred by the Project Manager hereunder and properly chargeable to the project are not paid promptly by the Project Manager, the Contracting Officer may, in his discretion, withhold from payments otherwise

Defendants' Exhibit A-6—(Continued)

due the Project Manager an amount equivalent to the amount of any such bill. Should the Project Manager neglect or refuse to pay such bills within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills directly, and in such event a deduction equal to five percent (5%) of the amount so paid directly shall be made from the Project Manager's fee.

4. Final Payment. Upon completion of the work and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Project Manager the unpaid balance of the cost of the work determined under Article II hereof, and of the fee, less any sum that may be necessary to settle any unsettled claims in connection with this contract, or any claim the Government may have against the Project Manager. The Contracting Officer shall accept the completed work with reasonable promptness. Prior to final payment and as a condition thereto, the Project Manager shall furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as are specifically excepted by the Project Manager from the operation of the release in stated amounts to be set forth therein.

Article IV - Records and Accounts—

Inspection and Audit

3. Any duly authorized representative of the Pro-

Defendants' Exhibit A-6—(Continued)

ject Manager shall be accorded the privilege of examining the books, records, and papers of the District Engineer relating to the cost of the work for the purpose of checking and verifying such cost.

Article V - Special Requirements

1. The Project Manager hereby agrees that he will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer or his authorized representative may approve or require. In every instance where this contract requires the United States to reimburse the Project Manager the premium on a bond or insurance policy, the bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

(c) Enter into no subcontract for any portion of such work, except in the form prescribed by the Commissioner of Public Roads, nor without the written approval of the District Engineer. Subcontracts are defined as contracts entered into by the Project Manager with others which involve the performance, wholly or in part at the site of the work, of some part of the work described in Article I hereof.

(d) At all times during the progress of the work, keep at the site thereof a duly appointed and qualified representative who shall receive and execute

Defendants' Exhibit A-6—(Continued)
on the part of the Project Manager such notices, directions, and instructions as the District Engineer may give.

(h) The Project Manager further agrees that upon the termination of this contract, or upon the termination of the services of any of his employees recruited in and brought from the United States, he will return such employees in accordance with the terms of their contract of hire immediately to the place of their recruitment or, at the option of the employees, to some other place in the United States at equivalent or less cost. The expense of returning employees to the United States hereunder shall be a reimbursable charge under the contract.

Article IX - Labor

(c) Should the Project Manager or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included, as approved for the work by the Contracting Officer or his authorized representative, such increased wage shall be at the expense of the Project Manager and shall not be reimbursed by the United States. When, in connection with the audit and check by the District Engineer, or his authorized representative, of the Project Manager pay rolls, it is found that one or more laborers or mechanics have been paid wages at rates in excess of the approved wage rates established for such laborers or mechanics, the reimbursement made to the Project

Defendants' Exhibit A-6—(Continued)

Manager on account of such pay rolls will not include such excess payments.

Article X - Workmen's Compensation Insurance

During the life of this contract the Project Manager will provide and maintain, for all employees of the Project Manager engaged in work under this contract, Workmen's Compensation Insurance or such other protection for employees as may be required by Federal, State, Canadian or Provincial statutes in the jurisdiction in which such work is performed, or such protection for employees as may be required by the Contracting Officer in those places where there are no such statutory requirements, under direction of the Contracting Officer. If the whole or any part of the work under this contract is sublet, the same protection provided for employees of the Project Manager will be provided for the protection of the employees of the subcontractors. The Project Manager shall supply the District Engineer with proof of compliance with this Article.

Article XI - Accident Prevention

In order to protect the life and health of his employees in the performance of this contract, the Project Manager will take or cause to be taken such measures as the Contracting Officer may determine to be reasonably necessary for this purpose.

Article XII - Notice To Government of
Labor Disputes

Whenever an actual or potential labor dispute is

Defendants' Exhibit A-6—(Continued)
delaying or threatens to delay the timely performance of the work, the Project Manager will immediately give notice thereof to the District Engineer. Such notice shall include all relevant information with respect to such dispute.

Article XVI - Definitions

5. The term "General Manager" shall mean the representative of the Project Manager having general direction and supervision of the work.

EQUIPMENT RENT SCHEDULE

(4) Each piece of equipment furnished by the contractor on which rental rates will be paid must be certified and approved by the Engineer in charge as necessary and as of suitable type and capacity for use on the project and must be given an identifying number as directed by the Engineer. Such certification and approval by the Engineer will be made prior to placing the equipment in operation, and neither the rental nor the shipping charges will be paid for equipment not certified and approved.

(5) If requested, preliminary inspection and certification of equipment prior to shipment will be made by the Public Roads Administration. This preliminary inspection and certification is for the purpose of expediting the loading and shipping of equipment determined to be necessary and does not constitute evidence of approval of condition of equipment at the job site.

(6) The responsibility for the condition of the

Defendants' Exhibit A-6—(Continued)

equipment is placed solely on the contractor and approval of class, type and capacity of equipment by the Engineer it not to be construed as approval of the condition of the equipment. If at any time any unit of equipment furnished by the contractor cannot be operated efficiently due to its having been originally furnished in an unsatisfactory condition or with defective, missing, or badly worn parts, the Engineer shall notify the contractor of the suspension of the rental until such time as the equipment has been placed in a satisfactory condition. The cost of placing such equipment in satisfactory operating condition shall be borne by the contractor and shall not be reimburseable as a part of the project cost. The judgment of the Engineer as to the condition of equipment shall be final.

(14) Necessary repair and operating costs of the equipment will be paid directly by the contractor and be reimbursable as a part of the direct project cost.

(17) Charge for necessary packing and loading for shipment to the project, necessary unpacking and unloading charges at destination, and necessary packing and loading charges for return shipment will be subject to reimbursement. Unpacking and unloading charges at destination upon return of equipment will not be subject to reimbursement.

Mr. Sager: I would like to recall Mr. Northrup for further examination.

Mr. Peterson: I wonder if you will at the same time, put in a unit contract so the whole matter will be before the Court.

Mr. Sager: I will be glad to do that, but I haven't a certified copy.

Mr. Peterson: Is yours easy to read?

Mr. Sager: This is the one I gave you before, the copy.

Mr. Peterson: If you don't mind, I have a face copy. It is easier for the Court to read.

Mr. Conley: I would like to call counsel's attention to the fact it is marked up.

Mr. Sager: And may it be stipulated, Mr. [110] Peterson, that this is a contract—that Defendants' Exhibit A-7 being a contract—copy of the contract between the government and Frank Eblen and Orville Eblen.

Mr. Peterson: No objection.

Mr. Sager: One of the unit contractors on this job, and that all of the other unit contractors were the same.

Mr. Peterson: Same form, except probably as to amounts and names of parties.

Mr. Sager: Yes, we offer it then with that—

The Court: It will be admitted in evidence.

(Whereupon, unit contract referred to was received in evidence and marked Defendants' Exhibit A-7.)

Mr. Sager: I would like to recall Mr. Northrup for one or two further questions, if the Court please.

H. R. NORTHRUP,

resumed the stand as a witness on behalf of the Defendants, was examined and testified further as follows:

Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, was there any employees' compensation insurance on this Lytle and Green project?

A. None, in a private insurance carrier.

Q. Well, that is what I mean.

Mr. Sager: That is all. [111]

Mr. Peterson: I would like to ask one further question, if I may.

Recross Examination

By Mr. Peterson:

Q. Directing your attention, Mr. Northrup, to the policies issued by the United Pacific Casualty Insurance Company, are you able to tell us whether or not the United States was a named assured in that policy?

A. No, sir, they were not.

Q. It was not? A. No, sir.

Mr. Peterson: That is all.

Mr. Sager: That is all.

Mr. Peterson: Just a minute. Later on I understand that—oh, never mind.

Mr. Sager: I guess that is all.

(Witness excused.) [112]

M. B. CHRISTENSEN,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. M. B. Christensen.

Q. And your present occupation, Mr. Christensen?

A. Highway engineer, United States Public Roads Administration.

Q. How long have you been with the Public Roads Administration?

A. Approximately eighteen years.

Q. And did you have anything to do with the Lytle and Green contract?

A. In what way do you mean?

Q. Well, with the appearing on it?

A. I had nothing to do with the contract directly. However, I was connected with the Alaska Highway in a personal capacity.

Q. And where? A. At Seattle.

Q. During what period of time?

A. During 1942, from May until about February of '43.

Q. And what were your duties in that position during that time?

A. I was in charge of the personnel division for the Alaska Highway, having to do with the government employees, primarily. [113]

(Testimony of M. B. Christensen.)

Q. And what project or job was under your supervision, or your work?

A. Well, I had the recruiting, hiring, and everything pertaining to it,—all of the engineering, administrative, and other employees of the government, including the workmen under the Lytle and Green contract and associated contractors.

Q. Do you know Mr. Wally?

A. Yes, he is an employee of the Washington office of the Public Roads Administration. I am not sure of his exact title, some kind of an administrative assistant, something of that sort.

Q. Now, did you have anything to do while you were in Seattle, in 1942, with the men working on the Alaska job under the Lytle and Green management contract?

A. Very little with the men, personally. However, I handled all their appointment papers.

Q. And how did you receive them?

A. They were sent to our office by Mr. Wally, who had been recruiting them or arranging for their appointments back in Iowa.

Mr. Peterson: Now, we object to his testimony as to what Mr. Wally was doing. Obviously, it is hearsay.

The Court: The answer will stand, objection overruled.

Q. What papers did you receive with respect to these men from Mr. Wally?

A. There were a number of papers—I believe you have a set of them there. They are the same

(Testimony of M. B. Christensen.)

forms as are used in the case of hiring any other federal employee. There is [114] the fingerprint chart, the medical certificate and application form, and an office——

Mr. Peterson: I think the record when it is finally introduced, if introduced, will speak for itself.

Q. Showing you Defendants' Exhibit A-8, of what does that exhibit consist, Mr. Christensen?

A. This consists of the papers which were received by me in connection with the appointment of the employees, except for this last—this last card is merely a card index we use in our file. It was made up for our ready reference, there. It was not prepared as part of the appointment directly, and this manifold folder here, a number of copies, was not received by me from Mr. Wally, it is the form that we prepared in Seattle for the official appointment.

Q. Now, perhaps those forms have some number or designation. Would you refer to them by that, and state what each one is?

Mr. Peterson: I think it shows on its face. I submit, if the Court pleases, that these documents are printed, and they must show on the face what they are. It is unnecessary.

Mr. Sager: I am not too sure they do that, without some explanation.

Mr. Peterson: Well, if any explanation is necessary, the time for that has not been reached.

The Court: Oh, he may answer. It is purely

(Testimony of M. B. Christensen.)

a matter of identification of the exhibit. The exhibit has not been offered yet. [115]

A. The first form is merely an identification card that the employee kept with him on the project.

The next one is the fingerprint chart. The next one is the recommendation for appointment, which gave the employee's name and title, salary and so on, and signed by Mr. Wally.

The next one is an application form prepared by the employee.

The next one is a *personnel* history statement prepared by the employee himself to show the various things with reference to his previous life, and then there is a *personnel* affidavit in which he says he is not a member of any subversive organization.

There is the oath of office, which entirely speaks for itself, a certificate of medical examination, and then this is the one I mentioned which is prepared in our office, the official appointment.

Q. Yes. Now, are those the usual forms required for Civil Service appointees?

A. They are the same forms as were used for the employment of all of our engineers, accountants, and other Civil Service employees, which were recruited for this job.

Q. And are they used for other jobs for Civil Service appointees?

A. Yes, sir, they are used for all Civil Service appointments, except this identification card is not ordinarily used in the States.

(Testimony of M. B. Christensen.)

Q. That is the top one?

A. The top one, yes.

Q. Now, then all of those forms except the last two, do I [116] understand to be received by you from Mr. Wally? A. That is right.

Q. With respect to each person on the job?

A. With respect to each one of those Lytle and Green workmen.

Q. And then what did you do upon receipt of that series of forms?

A. We checked through them to see that everything was properly filled in, and papers were complete in all respects, properly signed, and then we prepared this last form here, the official notification of appointment, which copies were distributed to the employee himself and to the accounting offices, to the Washington office of the Civil Service Commission and various other places.

Q. The forms that came to you from Iowa, by whom were they signed?

Mr. Peterson: I think the forms are the best evidence.

Mr. Sager: Let me straighten this out.

Q. This is just a set of blanks that you have now as an exhibit?

A. These are blank forms, yes, sir, no signatures on them. The medical certificate of course is signed by the doctors.

Mr. Peterson: Just a minute, I think the——

The Witness: Pardon, I did not hear.

Mr. Sager: There is an objection.

(Testimony of M. B. Christensen.)

Mr. Peterson: Whatever they are, the signed documents, are the best evidence of who they were signed by and when they were signed.

Mr. Sager: These are not signed by anybody, [117] of course. This is just a blank set of forms.

The Court: He may answer.

Mr. Peterson: Take exception to the ruling of the Court.

A. Most of these forms were filled out by the employee himself and signed by him.

Mr. Peterson: Now, the form, the original is the best evidence, and as I understand the rule, in the absence of a showing it is lost or can't be produced, is the only evidence. I am objecting to all this evidence.

The Court: That is true, Mr. Peterson, as a rule, but in this particular case the Court is not going to require the hundreds of employees who were employed here, that their records be brought in in order to meet a situation as presented at this time in this case. These employees were either employees who were sought to be selected as Civil Service employees, or in fact Civil Service employees, and it would be all out of reason to attempt to bring in the entire pay roll of every individual who is named in these documents, who have heretofore been admitted on these submitted pay rolls.

Mr. Peterson: May I interrogate the witness a minute in respect to this?

The Court: Yes, you may.

Mr. Peterson: Where are those originals that were sent to you?

(Testimony of M. B. Christensen.)

A. I am not sure whether they are still in Chicago or whether they have been taken to Washington, D. C.

Mr. Peterson: Did you make any request to [118] obtain—were you asked to obtain them if they were obtainable?

A. I did not. I don't know whether Mr. Sager did.

Mr. Peterson: Well, no request was made of you?

A. No, sir, I have had no control over them since last October.

Mr. Peterson: They came out here, and after you had gotten through with your connection with the matter, you sent them in to some place?

A. Yes, sir.

Mr. Peterson: Oh, I think that we could not agree with the Court's ruling, because there are many of them that this fact that there are many, I do not understand changes the rules of evidence. However, in order to shorten the matter up as I promised last night, we will stipulate that these various workmen made applications and with respect to each workmen a form, as you have marked that as an exhibit, was filled out.

Mr. Sager: We will offer that in evidence then. What is the exhibit number?

The Clerk: A-8.

The Court: It will be admitted in evidence.

(Whereupon, set of forms referred to were

(Testimony of M. B. Christensen.)

then received in evidence and marked Defendant's A-8.)

Mr. Peterson: And of course, it is subject to our general objection.

The Court: Yes, I understand your general [119] objection is, it is immaterial whether they were or were not employed in this manner?

Mr. Peterson: Yes.

Q. Were any of these forms that came to you signed by the contractors?

A. No, sir, they were not.

Q. Mr. Christensen, are you familiar with the circumstances of these men's Civil Service status, while on this work?

A. Yes, if I understand your question correctly.

Q. Well, let me ask you this: Do you know whether or not Social Security was deducted from their pay?

A. No, sir, it was not.

Q. Let me ask you this, are there different classifications under Civil Service?

A. Yes, sir.

Mr. Peterson: I think the Civil Service Act, and the rules and regulations are the best evidence as to that.

Q. What general classification were these employees under?

A. They were under what we call Schedule "A" Employees, hired under Schedule "A" of the Civil Service regulations, which largely pertains to employment of people for duty outside of the United States, as distinguished from the ordinary em-

(Testimony of M. B. Christensen.)

ployees working in the United States. The primary difference there, is they are not required to take competitive examinations, and to be certified by the Civil Service Commission from a list of eligibles, but merely the employing officer satisfies himself as to the qualifications. He can hire any one he pleases, foreign or otherwise, providing he is not an enemy alien. [120]

Q. Were these men paid for overtime?

Mr. Peterson: I think that is immaterial, if the Court pleases.

The Court: I do not know the materiality.

Mr. Sager: I will suggest to the Court the materiality. If they are on Civil Service, they do not get overtime. If they are individual employees under the laws they get paid overtime for anything in excess of eight hours a day, or for Sundays.

The Court: He may answer.

A. Originally, they were not paid anything other than straight time for the time worked. Those were hourly employees on an hourly basis. I think a few of them were on a monthly basis—administrative employees. They have received on overtime, but by special act of Congress or an executive order—I have forgotten which, late in 1942, they changed it so they could receive overtime for work in excess of eight hours a day.

Q. And was that applicable to all government employees?

A. It was to those employed in Alaska only.

(Testimony of M. B. Christensen.)

It did not apply to those in the United States or in Canada.

Q. Did these men acquire annual leave or sick leave?

A. Those who were employed on a monthly basis did, but those who were on an hourly basis did not, on the ground they were intermittent employees.

Mr. Peterson: May I just object to his stating the grounds? He can state the facts.

The Court: Yes.

Q. Is that provision true of the Schedule "A" Civil Service employees generally? [121]

A. The same is true on all of them, as I understand.

Q. Do you know, Mr. Christensen, whether these men—whether any men were injured on this job during the period of the coverage of this contract, June 17th to August 31st, 1942?

A. Yes, sir, there were a number of them.

Q. Do you know whether or not they were certified to the Federal Employees' Compensation Commission?

A. Yes, sir, they were.

Mr. Peterson: We submit, of course, that is immaterial. This is a policy, and did not cover compensation. It simply covered liability.

Mr. Sager: There isn't any argument about that, but this is a factor to determine whether or not they are government employees.

The Court: He has answered. You will proceed.

Mr. Sager: I have a certified copy, if Your

(Testimony of M. B. Christensen.)

Honor please, of a series of records of the Employees' Compensation Commission of employees under these—one or more of these contracts that were injured during this period of time. I will offer that in evidence and think the certificate will not by itself show that the men were under these contracts, but I will, if it is admitted, I will have Mr. Christensen identify the names.

The Court: You mean, the facts would show that they were employees who, had they been other than as you contend, employees of the insured here, the insurer would have been liable?

Mr. Sager: I don't mean that.

The Court: Growing out of the negligence? [122]

Mr. Sager: The purpose of this is to show that only if they were compensated by the Employees' Compensation Commission they must be government employees. That is the only type of employee they pay. If they are not government employees they are paid then under a compensation insurance policy, under the law which requires it the same up there; as in the States, all employees, and that is true under the Federal Acts; employers must carry compensatiton insurance for their employees, accident insurance for their employees. If they are government employees, then they do not have to carry that, and they are compensated through the Federal Compensation Act, by the Commission.

Mr. Peterson: We object to this on the ground, of course, if the Court pleases, that it is voluminous and it simply will encumber the record here, if this

(Testimony of M. B. Christensen.)

case goes on appeal, this will all have to be printed.

Now, we are not going to dispute the fact that injured employees were compensated through the Compensation Commission. That is the only fact I understand he is interested in showing. It doesn't seem to me it is necessary to go ahead and show each individual and introduce all these reports and blanks.

The Court: I do not think it is necessary to introduce the exhibit if you stipulate that any employee upon the work here involved, if he suffered an injury whether by the negligence of a fellow employee or otherwise in the course of his employment, was cared for under the Federal Employees' Liability Act, or Compensation Act. [123]

Mr. Peterson: I don't know the facts, Your Honor. I have no knowledge of the facts. We are not going to offer any evidence on it. I do not like to stipulate to anything I don't know anything about, just as a matter of policy, but we are not going to offer any evidence on it. If we are willing to accept their proof on that, as far as that is concerned, these employees who were injured were compensated through the Federal Employees' Compensation Act, or whatever Act it was.

Mr. Sager: Well, of course I think the stipulation should go further than that. I am not too familiar with the Federal Employees' Compensation Act, but I think it also takes care of a situation where he may be a private employee and under the Act, the employer is required to provide compensa-

(Testimony of M. B. Christensen.)

tion insurance. To merely say they were covered under the Act, would not cover our situation here.

If you will stipulate these men were paid and compensated by the Federal Employees' Compensation Commission, with a government check, that is paid by the Commission, then I am not too interested in putting it in the record, although that is the proof of the ultimate fact, and that is the only thing I know about it is what the record shows.

Mr. Peterson: Well, there is a certificate on here of thirty-eight sheets. They are all small type-writing:

"I hereby certify that the injured persons named in the annexed papers were considered employees of [124] the Public Roads Administration of the Federal Works Agency, and were paid disability compensation and/or furnished medical treatment at the expense of the United States Employees' Compensation Commission under the United States Employees' Compensation Act of September 7, 1916 (39 Statute 742), and were paid disability compensation and/or furnished medical treatment as employees of the United States Government.

"I further certify that this Commission is not authorized by law to have and has not a seal."

Now, that seems to be the extent to which this compensation went.

The Court: Well, that certificate is evidently for the purpose of attempting to make the document admissible.

(Testimony of M. B. Christensen.)

Mr. Peterson: I think it has another purpose as well. It defines how they were compensated and under what provisions of the statute.

The Court: The Court takes judicial notice of the fact that the law provides the regulations of compensation can only be paid to a certain class, and certain groups, and they have to have a certain status. That is, every employee working upon a——

Mr. Peterson: After reading this certificate, Your Honor, we are willing to stipulate that employees who suffered injuries during the course of the work, employees of any—I don't know that there were any—between June 17th and September 1st, but if any did, they received compensation under the United States Employees' Compensation Act of September 7th, 1916, as [125] stated in the certificate.

The Court: And such medical care and attention?

Mr. Peterson: Yes, and such medical care and attention, were paid disability compensation, and/or furnished medical treatment as employees of the United States.

Mr. Sager: And that they were paid by the Federal Employees' Compensation Commission by government check.

Mr. Peterson: Well, I presume so. They must have been paid by the government in some manner. I think it is unimportant, as long as they were paid.

(Testimony of M. B. Christensen.)

Mr. Sager: I think it may be important whether they were paid by the Commission or paid by a private insurer.

Mr. Peterson: They were not paid by private insurers. We agreed to that. They were paid by the government, but that stipulation of it, we will admit those facts subject to our objection that they are irrelevant and immaterial in this case.

The Court: I do not see, Mr. Sager, under that stipulation that it has become necessary to submit as a part of the record in this case, the documents that are now in question.

Mr. Sager: I think probably that is right, Your Honor, and I do not want to insist on it. I would like to reserve the right, further though, I would like to examine it. There may be some part of it in addition to the stipulation that may be important. If I may [126] reserve the right, I do not want to withdraw the offer.

The Court: Very well.

Q. Mr. Christensen, do appointees under Schedule "A" of the Civil Service, are they entitled to a hearing upon discharge of termination of employment?

A. No, sir, they are not in the same manner as the regular Civil Service employee, who can only be discharged on showing of cause, except in case of reduction of force. These particular employees under Schedule "A" could be discharged any time we saw fit without showing the particular cause.

(Testimony of M. B. Christensen.)

Q. Do you know when the Civil Service status of these employees was terminated under the Lytle and Green project?

A. On March 30th, 1943, except for a few that had some annual leave earned, and they were carried for a few days beyond that to take care of their leave. March 31st, I should have said, instead of March 30th.

Q. Do you know whether or not at that time there was any agreement entered into by these men and the contractors?

A. Yes, sir, they were then signed up under the contractors' hiring agreement.

Q. Each——

A. Each individual employee.

Mr. Peterson: We submit the contract, whatever it is, is the best evidence. That evidence is a single contract signed by all these men, and we move to strike the answer and object to the evidence on the ground that the contract itself is the best evidence.

The Court: Objection will be overruled and exception allowed. [127]

Mr. Peterson: Note an exception.

Mr. Sager: You may inquire.

Cross Examination

By Mr. Peterson:

Q. Now, where were you—when did you come to Seattle, Mr. Christensen?

A. I believe it was the 18th of May, within a day or so of that.

(Testimony of M. B. Christensen.)

Q. The 18th of May, 1942?

A. '42, yes, sir.

Q. Where were you prior to that time?

A. I was in Ogden, Utah, my regular headquarters.

Q. How long had you been continuously in Ogden, Utah?

A. I had been there for approximately twelve years?

Q. Twelve years?

A. Prior to going to Seattle.

Q. You were not in Sioux City, Iowa, during the spring of 1942? A. No, sir.

Q. No, or in Nebraska? A. No, sir.

Q. So, you did not have anything to do with the hiring and recruiting of these men?

A. No, sir.

Q. And you don't know who hired and recruited them, as matter of fact?

A. Except that the papers of recommendation for appointment were signed by Mr. Wally.

Q. That is all you know about it? [128]

A. Yes, sir.

Q. You don't know who approached the individual and agreed on his wages, or what was done about that? A. No, sir.

Q. You have been connected with the Public Roads Administration right along?

A. Yes, sir.

Q. Yes. I show you Exhibit No. 10, and you will notice in the column under "Deductions" there

(Testimony of M. B. Christensen.)

are a number of deductions there. Are you able to tell anything about those?

A. They are deductions for board and lodging.

Q. They are deductions, sure of that?

A. I am quite positive.

Q. As a matter of fact, you don't know what they are for?

Mr. Sager: I submit that is argumentative.

The Court: Yes.

Q. As a matter of fact, you don't know what they were for, do you?

A. I was told by the one that prepared them. I did not prepare it myself.

Mr. Preston: I am asking him to testify to his own knowledge. I don't want him to testify to what some bellhop in the hotel told him.

A. I did not prepare the pay roll, so I can't say.

Q. You do not know.

Mr. Peterson: That is all.

The Court: I wanted to ask you a question or two. When these employees—well, first I will ask you just what was your relationship to this particular part [129] of the construction of the Alaska Highway?

A. I was in charge of the personnel division of the entire Alaska Highway District, and had to do with anything pertaining to the appointments and promotions and discharges, employees' compensation and things of that kind, with respect to government employees. Nothing particularly to do with those who were not government employees.

(Testimony of M. B. Christensen.)

The Court: Well, under the plan or arrangement that was in effect in 1942 at the time this hearing is involved, aside from the office staff and such similar employees, the other employees were what you designated as Civil Service employees?

A. I don't quite understand.

The Court: The man who used a pick and shovel and who drove the bulldozer and the tractor and the fellow who did all of the work on this job——

A. Yes, sir, they were Civil Service employees.

The Court: Well, were you in charge of them, was that——

A. Only so far as the personnel paper work was concerned. I didn't have anything to do with them while on the job.

The Court: Suppose one was to be discharged?

A. Then the recommendation was sent in from Alaska to that effect, and then we prepared the official——

The Court: Well, was that recommendation from some other government employee in the Bureau of Public Roads, or Public Administration, as it is now called? [130]

A. Yes, sir.

The Court: And who fixed their compensation?

A. That is something I cannot answer. The papers came to me. This is the recommended salary or wage, and we did not go beyond that question to fix it.

The Court: Well, those papers came to you from another employee?

(Testimony of M. B. Christensen.)

A. Signed by Mr. Wally, recommending the appointment.

The Court: Who had to do with their promotions or wage increases?

A. The papers on that came to me, signed by Mr. Polk, who was the man in charge of the Lytle and Green work in Alaska. That is, the engineer for the government in charge of all of the work in Alaska, on the Alaska Highway.

The Court: Then, did you keep the record as submitted to you from the job itself, as to who was entitled to sick leave and vacation pay and so forth?

A. That was kept not by the personnel division, but by our accounting division.

The Court: Did you have anything to do either directly or indirectly with the submitted pay rolls, monthly, that have been introduced in evidence here as exhibits in the case?

A. No, sir, except to refer to them occasionally.

The Court: I think that is all. [131]

By Mr. Peterson (Continuing):

Q. Now, I understand that your job was receiving these papers that were blanks—were made up and signed back in Sioux City, Iowa, and where they recruited these men? A. Yes.

Q. And then when some fellow up at the job was fired, a pick-and-shovel man, there was some kind of a report made out by the district engineer up there and the employer, and that was sent down to you? A. Yes, sir.

(Testimony of M. B. Christensen.)

Q. And that was about the extent of your connection with this matter, wasn't it?

A. Except that these papers that were received, were only recommendations. They were not official appointments or official discharges. We prepared those official papers of appointments and discharges, prepared them in our office.

Q. When they fired a pick-and-shovel fellow up there, and you got a report down here, did you do anything to get him put back on the job or anything of that kind? A. No, sir.

Q. You prepared some memorandum, what you called an official discharge, then, based on what you received from Alaska? A. That is right.

The Court: Well, did you have any discretion in the matter as to whether you would accept or reject?

A. Well, we probably could have had. However, we were willing to accept the recommendations that came in from Mr. Polk, our engineer in Alaska. I did not [132] question his actions as being correct.

Q. You want to tell the Court you could have directed the people in Alaska to put the fellow on the job again? A. I think we could have.

Q. Did you in any case? A. No, sir.

The Court: And did you have any discretion in whether to certify an individual whose name had been sent to you and who had made an application for appointment?

A. The question never arose, because we were

(Testimony of M. B. Christensen.)

just willing to accept what were sent to us. We probably could have, but we just did not.

The Court: Well, then, let me ask you the question in another way. If it had not been sent to you at all, would this fellow be eligible to employment?

A. We employed hundreds of engineering and administrative employees for our own direct operations without having the recommendations coming from anybody else. We just prepared them ourselves, applications we received.

The Court: Now, what I am trying to get clear is, was this just a formality, this matter of sending an employee of the Public Roads Administration somewhere in Iowa, sending you a name and you just signed, or did you have any discretion in the matter?

A. Well, as it actually operated, it was more or less of a routine matter as far as I was concerned. We just took what they sent us and fixed up the papers and let it go at that. The question never arose as to [133] whether we could overrule anything.

The Court: Well, what were your duties?

A. My duties were to see, as far as these Lytle and Green workmen were concerned, to see that the papers received were properly completed, the necessary papers there, and then to prepare the official appointment papers.

The Court: If you found one of those papers—found the individual was an alien enemy?

A. We would refuse to appoint him.

(Testimony of M. B. Christensen.)

The Court: Suppose you found one that would not certify to the oath he was not a member of any subversive organization?

A. We would refuse to appoint him.

The Court: Now, after March, 1943, what was your relation with reference to employees on the job?

A. Well, I had nothing further to do directly with these Lytle and Green workmen. However, I continued with respect to all other government employees on the job in the same capacity.

The Court: Well, when you say "Lytle and Green workmen," do you thereby include all of the other contractors who were on the job?

A. Yes, sir, all of the associated contractors.

The Court: When you used the term "Lytle and Green employees" in the selection of the workmen in the summer or season of 1942, did you likewise mean to imply all of the employees?

A. Yes, sir, all of the affiliated contractors.

The Court: That is all. [134]

Q. I understand when the papers came to you, these various blanks filled out, properly filled out, you checked them over to see they were properly checked out, then you issued what you call this official authority, or something, and sent it to who?

A. There were numerous copies, one went to the man himself, and one went to Lytle and Green offices, and then copies to the accounting division in the Washington office.

(Testimony of M. B. Christensen.)

Q. I appreciate you make many copies of these things, but your business really was to see that the papers were in order? A. That is right.

Q. Yes, and if they were in order, then you issued this—what do you call it?

A. Official appointment.

Q. Official appointment? A. Yes, sir.

Q. Why, you considered your duties performed in the matter?

A. Yes, unless the question came up later about a change in his salary or discharge or something of that kind, which is the same thing.

Q. Well, that was reported to you only and then you made the appropriate entries?

A. I wouldn't say that. It was recommended that action be taken and then the official action was taken in our office. It was not a case of their taking the action and reporting it to you.

Q. Well, if they reported a man up in Alaska for a promotion, from a dollar an hour to a dollar and five cents an hour—— [135]

Mr. Sager: Who do you mean by "they?"

Q. (Continuing): ——a dollar an hour, then that matter was recommended by the—first by the Lytle and Green boss on the job, the district engineer there, and then they made up some kind of a report and then you finally got the report. That is the way it happened, wasn't it?

A. The recommendation?

Q. Yes, you finally got whatever it was. It was in the shape of a writing of some kind?

(Testimony of M. B. Christensen.)

A. Yes.

Q. When you got that you then entered it, made appropriate entry and filed it properly?

A. I should call your attention to the fact that as long as it was only a recommendation received from the field, there was no official action had to be taken in our office.

Q. You approved those things as a matter of course, didn't you?

A. Generally speaking, yes.

Q. Now, was there any one, for instance, throughout the entire job, that you turned the district engineer down?

A. I don't recall any.

Mr. Peterson: No.

The Court: Well, you were still in charge of this region in 1943?

A. Yes, sir.

The Court: When the change in the matter of the status of the employees generally other than those directly identified with the governmental agency, the Public Roads Administration or Federal Works Administration, [136] took place, was there a change in the matter of the payment of these employees?

A. I had nothing to do with the payment. I can only say from hearsay there was no change. The checks were issued in the same manner.

The Court: That is, they were government checks?

A. Yes, sir.

(Testimony of M. B. Christensen.)

The Court: That is all.

Redirect Examination

By Mr. Sager:

Q. These recommendations that came to you from Alaska were recommendations of whom?

A. They were signed by Mr. Polk, our engineer in charge of Alaska.

Q. That is, P.R.A. engineer? A. Yes.

Q. It was not a recommendation from the contractors?

A. It also bore his signature, as I recall, and then they were countersigned by Mr. Polk.

Q. Now, you say that in receiving the papers from Sioux City, you merely examined them to see that they were properly filled in. If so, the appointment was issued? A. Yes, sir.

Q. Yet, if you found in those papers that came to you that the applicant did not comply with whatever requirements it may be, would you then turn down that appointment?

A. We would not make the appointment. [137]

Mr. Peterson: Just a minute, this is calling for a conclusion. He has been asked—he said he did not in the practical operation of the thing, through the entire job, did not turn down anybody. Now, it is immaterial to ask him what he would do or might do if some hypothetical situation arose. I don't think it would help the Court.

The Court: The Court is interested in just what power he had, not just what action he took upon a particular situation.

(Testimony of M. B. Christensen.)

Mr. Sager: I think that was the purpose of my question.

The Court: Yes, the objection will be overruled. He may answer.

Mr. Peterson: Let me call Your Honor's attention to the contract. I suppose that will control finally. The contract provides that when an employee is going to be discharged, it shall be at the instance of the foreman, the Lytle and Green man on the job. It is reported to the district engineer. If he approves it, that settles it. That is the contract, and it is the same with the hiring. I am stating what the contract is. It is here.

The Court: He may answer the question.

The Witness: What was the question, again?

The Court: That same question has been asked and answered, I believe.

The Witness: I think I answered it once before. To repeat that, we would not make the appointment until either the deficiencies were corrected—I [138] will say we will not make the appointment unless all of the deficiencies in the papers were corrected. If they were not corrected, the appointment would not be made.

Q. Well, if the papers showed some failure on the part of the applicant to comply, which could not be corrected, his status would not permit——

The Court: I think he has answered that—covered that.

Mr. Sager: That is all.

(Testimony of M. B. Christensen.)

Recross Examination

By Mr. Peterson:

Q. As a matter of fact, all you did was to correct these papers and see they were in order, isn't that correct, in the final analysis of the matter?

A. No, it is not correct. There were no appointments made until after we had issued the paper in our office. It was merely a recommendation to make an appointment.

Q. You checked them, and if they were in order you issued an authority for the man to go to work?

A. Yes.

Mr. Peterson: That is all.

(Witness excused.) [139]

C. G. POLK,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name, please?

A. C. G. Polk.

Q. And what is your present position or occupation?

A. I am a civil engineer with the Public Roads Administration.

Mr. Peterson: Kindly speak a little louder, Mr. Polk, please.

(Testimony of C. G. Polk.)

A. I am a civil engineer with the Public Roads Administration.

Q. How long have you been with the Public Roads Administration?

A. About twenty-eight years.

Q. And where were you during 1942?

A. In Alaska.

Q. And what was your position and duties there?

A. Well, I was in charge of all of the field activities of the Alaska Highway within Alaska, for the Public Roads Administration.

Q. What was your title up there, Mr. Polk?

A. Assistant construction engineer.

Q. And who was your superior, if any, there?

A. My direct superior was the construction engineer, who was located in White Horse. He in turn reported to the district engineer in Seattle.

[140]

Q. Now, did you have anything to do with the construction of the Alaska Highway under Lytle and Green and associated contracts?

A. Yes, I had general supervision of it.

Q. And where were your headquarters while that job was going on?

A. Well, in 1942 they were at a small post office called Gulkana.

Q. When did you go up to Alaska, first?

A. In May, of 1942.

Q. Are you familiar with the various associate contractors under this Lytle and Green management contract?

A. Yes, I am.

(Testimony of C. G. Polk.)

Q. Did you know the contractors themselves?

A. Yes, sir.

Q. And their organizations?

A. Yes, sir.

Q. How many contractors were there?

A. There were fifteen in a total, including Lytle and Green.

Q. And what generally were the——

The Court: That is fifteen on this 155 mile job that is involved here? A. Yes, sir.

Q. What generally was the type of work done by these contractors?

A. Well, the work is that of constructing the road, excavation of material, the clearing of the right of way, installing drainage structures, bridges, and so forth.

Q. Did all the contractors do the same sort of work? A. No, they did not. [141]

Q. To what extent was there a difference in their work?

A. Some of them were purely bridge contractors—constructed nothing but bridges. There were four of them.

Q. How many of those? A. Four.

Q. And which ones were they?

A. The firms of Duvall & McKinney, Western Engineering Company, Weldon Brothers.

Q. And then, what were the others?

A. Then we had the—I believe it was nine grading contractors. They did the dirt work, you might say, clearing out the right of way.

(Testimony of C. G. Polk.)

Q. Now, about how many men were on the job altogether during 1942?

A. There were about twelve hundred assigned to the contractors. That is, exclusive of my own force.

Q. You had a force there, yourself?

A. I had, I believe, about a hundred and fifty.

Q. What did your force consist of?

A. Mostly engineers, and also auditors, equipment inspectors.

Q. Now, approximately how many men would each road contractor have?

A. About sixty.

Q. And each bridge contractor?

A. About ninety.

Q. Were you out on the job to a substantial extent?

A. Well, yes, quite often, although mainly office work.

Q. Do you know whether or not the men there on the job were Civil Service appointees? [142]

A. Oh, yes, they were.

Q. Were there any of them that were not?

A. The contractors themselves were not, and——

Mr. Peterson: I did not get your last answer.

The Court: The contractors themselves were not.

Mr. Peterson: Thank you.

A. (Continuing): And in those instances where

(Testimony of C. G. Polk.)

the contractors were not in Alaska, they maintained a representative there. That is, on the contractor's pay roll, he was not Civil Service.

Q. How many of the contractors had that sort—

A. I can only remember of two.

Q. And in all the other cases, the contractor himself was there? A. Yes.

Q. And then, except for the contractors themselves, or in the two cases where they had an agent, do I understand all of the rest of the men on the job were under Civil Service?

A. That is right, as applying to these unit contractors, Lytle and Green, they had two men, I believe, that were not Civil Service.

Q. How much—generally about how much of an organization did Lytle and Green have up there?

A. About two hundred and fifty men.

Q. That would be included in the twelve hundred over all? A. Yes.

Q. Now, Mr. Polk, can you tell us something about the supervisory setup of—well, we will confine it first to [143] the bridge contractors. What I am trying to get at is, who gave the orders and who was on the job directing the work?

A. Well, the bridge outfits—

The Court: I think we will take the morning intermission now. It is time for the morning recess, of fifteen minutes.

(Recess.)

(Testimony of C. G. Polk.)

Mr. Sager: If Your Honor please, with respect to Defendants' Exhibit A-9, certified copy of the records of the Employees' Compensation Commission, if it can be stipulated that during the period from June 17th to August 31st, 1942, the period of the insurance coverage here, that there were in fact thirteen men who were under one or the other of these contractors on the job in Alaska who were injured on the job, and who were compensated for their injuries or received medical aid through the Federal Compensation Commission, if Mr. Peterson will agree to that further stipulation——

Mr. Peterson: We will stipulate to the fact, but subject to our objection as irrelevant and immaterial in this matter.

Mr. Sager: We will withdraw our offer.

The Court: I am not understanding from that stipulation, however, that the contract of the insurance involved in this case covered the cases of these thirteen or any one of them?

Mr. Peterson: No, that is understood. [144]

Mr. Sager: This was not compensation insurance, Your Honor. It was only covered liability of third parties.

The Court: But, the injuries were not injuries that grew out of the negligence of some third party this policy of insurance would have covered instances——

Mr. Peterson: We will agree that they were injuries that did not come under the coverage of this policy.

(Testimony of C. G. Polk.)

Mr. Sager: Yes, as a matter of fact the policy excludes any damage or any injury to employees on the job.

Mr. Peterson: That is compensation. It does not, as I construe this policy. For instance, the employee of Smith as a third party, with respect to the employee of Jones and some other unit contractor——

Mr. Sager: I don't agree with that.

Mr. Peterson: I understand. I will stipulate that these thirteen who received injuries or compensation, the injuries and compensation were not such as came under the coverage of the policy for which this premium is claimed. You will agree to that, won't you?

Mr. Sager: Yes. In other words, they were not entitled to come back to the insurer here and claim compensation from him.

The Court: Very well, anything further now on your direct examination?

Q. I think my last question to you, Mr. Polk, was to tell us generally the manner in which orders and directions [145] as to the actual work itself was given from the original source, down?

A. Well, naturally they were given by one of my resident engineers to the—either the contractor himself or one of his representatives, that is, the superintendent under him, whoever was in direct charge of that activity.

Q. Now, before you go beyond that, if the order was given to the contractor, that, of course, the

(Testimony of C. G. Polk.)

contractor was not a Civil Service employee, is that correct? A. That is right.

Q. Were the contractors' superintendents Civil Service employees? A. Yes.

Q. All right, and from the superintendents, where did the order or direction go?

A. It would go to a foreman who would carry out the order.

Q. Were there any bosses or such under the foremen?

A. Ordinarily not. Well, I will change that a little there. There were different grades of foremen, yes, usually.

Q. Suppose you explain that to us with respect to each type of contractor.

A. Well, in the bridge contracts—it applies in general to all the contractors. Each organization maintains two superintendents. Presumably—theoretically one for the day shift and one for the night shift, and also they maintain what is known as general foreman who look after the certain activity, for instance, the bridge contractors had various camps, sawmill camps, the bridge camp, and second bridge camp. These would be in charge [146] ordinarily of a general foreman, and under him they would have one or two lesser foremen. We call them straw bosses.

Q. Now, were the foremen and the straw bosses Civil Service appointees?

A. Yes, sir.

(Testimony of C. G. Polk.)

Q. And of course the workmen themselves, they were Civil Service appointees? A. Yes.

Q. Who determined where a particular contractor would work?

A. That was arrived at through joint agreement with representatives of Lytle and Green and myself, or my assistants.

Q. Now, did you have a government engineer with each of the contractors?

A. Most of them, yes.

Q. Mr. Polk, at my request you have prepared a sketch of the part of the highway within Alaska, have you? A. Yes, sir.

Q. I will show you what is marked Defendants' Identification A-10, and ask you if that is the sketch you prepared?

A. Yes, that is it.

Q. Now, this sketch shows the portion of the highway from Slana to the Canadian border?

A. Yes, sir.

Q. And the estimated distance of that portion of the highway is 155 miles? A. Yes, sir.

Q. Was the highway segregated into portions or sections? [147] A. Yes.

Q. And you have shown that on the sketch?

A. Yes.

Q. What sections comprise the estimated 155 miles from Slana to the border?

A. Section A-1 and Section A-2.

Q. Now, when you went up there—by the way,

(Testimony of C. G. Polk.)

about when did you start actual work on the highway?

A. That is, the actual construction, not arrival of the crew?

Q. That is right.

A. It was on the 7th day of July, 1942, was the first operation.

Mr. Peterson: May I ask you to speak louder, please, Mr. Polk?

A. (Continuing): It was the 7th day of July, 1942.

Mr. Peterson: Thank you.

Q. And where did you start work at that time?

A. Well, that particular activity was on Section A-3, in the vicinity of Gulkana, Alaska.

Q. Is that a part of the road from Slana to the Canadian border? A. No.

Q. When did you get on the—any portion of the highway from Slana to the border?

A. About August 1st, of that year.

Q. And what contractors were assigned to that portion of the highway then?

A. The firms of E. P. Dusenberg and Weldon Brothers.

Mr. Peterson: The last name? [148]

A. Weldon Brothers.

Q. How long did they work on that section of the highway?

A. The remainder of the season.

Q. Did any other contractors work on that por-

(Testimony of C. G. Polk.)

tion of the highway between the period, whenever they started, July 7th and August 31st?

A. No.

Q. Where were they working, the other contractors?

A. They were working on Sections A-3 and Sections A-4.

Mr. Sager: I will offer this sketch in evidence, Your Honor.

Mr. Peterson: I wonder if we can stipulate as to the amount there, to save encumbering the record. The Defendants' Exhibit No. 10 is objected to as irrelevant and immaterial.

Mr. Sager: I think Your Honor may want to see it.

The Court: It will be admitted. The objection will be overruled, as illustrative of the witness' testimony.

(Whereupon, sketch referred to was then received in evidence and marked Defendants' Exhibit No. A-10.)

← To Fairbanks

Big Delta Junction

Richardson Highway

To Anchorage and Valdez

Gulkana

Section H-3
Est. length 60 mi.

Section H-4
Est. length 110 miles

Slana

Section H-2
Est. length 65 mi.

* Tomacross
Tok Junction

Section H-1 Estimated length 90 miles



No.
DEPENDANT EXHIBIT **H-10**

SEP 7th 1944 adm.

1000
NO. 1000
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

MAR 20 1945

PAUL P. O'BRIEN.
CLERK

Alaska
Yukon Territory

Sketched showing Plan of
Roads & Highways

(Testimony of C. G. Polk.)

Mr. Peterson: Your Honor, do you mind if we ask the witness to step down for a consultation? We may stipulate here.

The Court: Yes, he may do so.

Mr. Sager: Now, I think we can stipulate, Your Honor, that the pay roll of Dusenberg Brothers, contractors, during this entire period, June 17th to [149] August 31st is \$102,380.24.

The Court: How much was it?

Mr. Sager: \$102,380.24; and the pay roll of Weldon Brothers during the same period was \$71,357.66.

Q. Just what was the title of Dusenberg—I mean the contract name?

Mr. Peterson: Are you through with that stipulation?

Mr. Sager: Well, yes.

A. E. M. Dusenberg, Inc., I believe.

Mr. Peterson: Your Honor, we will stipulate to the facts stated.

Mr. Sager: Now, I want to——

Mr. Peterson: Do you want to add something to it?

Mr. Sager: Yes, this of course was the pay roll of the Civil Service appointees, as well as the one—well, that would be it entirely, wouldn't it, Mr. Polk?

A. That is right.

Q. I mean, in these pay rolls, there wouldn't be a pay roll of a non-Civil Service appointee on these two contracts?

A. No, it would not.

(Testimony of C. G. Polk.)

Q. So, this entire pay roll will be Civil Service appointees?

A. Yes, sir.

Mr. Peterson: We will stipulate to the facts, but object on the ground that it is irrelevant and immaterial, and on the further ground that it is not within the issues made by the pleadings. If it is intended to prove we are not entitled to this premium by reason of the fact that the work was not done on the 155 miles, if [150] that is the intention, then there is no issue of that fact made by the pleadings. The only issue made by the pleadings is a mistake in stating the facts, and that they thought and assumed these men were employees of the contractors, instead of Civil Service employees.

The Court: Well, I understand you stipulated.

Mr. Peterson: Stipulated to the facts, Your Honor, but my objection is to the relevancy and materiality of it, and on the further ground it is not within—tending to prove a fact not made an issue by the pleadings.

The Court: The objection will be overruled and exception allowed.

Mr. Peterson: Note an exception.

The Court: I would like to have this matter somewhat cleared up. The pleadings do not raise the issue of a mistake as to the time, just merely raises the issue as to the nature of it, or as to the status of individuals whose pay roll was submitted.

Mr. Sager: Well, that is the only purpose of the second affirmative defense. The issue raised

(Testimony of C. G. Polk.)

by that defense. Yes, I am still insisting that the first affirmative defense opens up the entire question, whether or not this is an account stated and the reason I offer this, Your Honor, is that if there is not an account stated, then of course the burden of proving the amount of premium is upon the plaintiff. In other words, he first has the burden of proving an account stated. If he does not sustain that burden, he then has [151] the burden of proving the amount of premium due, and as I say, I still insist that the question of account stated is still an open issue, and under our first affirmative defense the circumstances alleged there, proof offered in support of it that there is.

The Court: The Court rules against you on that. Your situation would be somewhat different if the government were an intervenor here, but the status of the government is, in this case, that it is not in the case at all.

Mr. Sager: That is right.

The Court: Well, as a matter of fact, the Court is justified in taking judicial notice that the United States Attorney is appearing here by the direction of the Department of Justice, for the purpose of protecting the Government's interest, and that the defendant has more or less assumed the attitude he is more or less in a position of a nominal defendant, and as far as the defendant is concerned, he is bound himself by creating as to himself an account stated.

(Testimony of C. G. Polk.)

Mr. Sager: Well, I do not agree with the Court's finding on that, or position on it, but I understand that is the issue.

The Court: But, I will permit you to go ahead and make your proof in reference to whether, as I understand this witness, the job covered by this contract of insurance, according to his testimony, was not actually undertaken, whether the employees be Civil Service or otherwise until some time late in July.

Mr. Sager: Well, I would not say that because, [152] of course,—

The Court: Well, he has testified the 17th of July.

Mr. Sager: The 7th, I believe.

The Court: No, the 7th was work on another section, but not on either of these sections.

The Witness: On this first—

Mr. Sager: Maybe I better clear that up.

Mr. Peterson: Take an exception to the ruling of the Court.

Q. Mr. Polk, you actually started work on the road itself on July 7th? A. Yes, sir.

Q. And at that time did you start on either of these sections? A. No, we did not.

Q. On the portion of the road from Slana to the borders? A. No.

Q. When did you start on that?

A. About August 1st.

Q. I see, and at that time only these two con-

(Testimony of C. G. Polk.)

tractors, Weldon Brothers and Dussenberg Brothers went upon that section?

A. That is right.

Q. And were there any other contractors on that section from Slana to the border at any time during the period from June 17th to August 31st?

A. No.

Mr. Sager: I think that is all. [153]

Cross Examination

By Mr. Peterson:

Q. Mr. Polk, you arrived in Alaska, I understand, some time in May, the date is not important, 1942?

A. Yes, sir.

Q. And you had engineers, and this was a kind of hurry-up job, and you were making preparations to get it going, I take it?

A. Yes, sir.

Q. Now, as I understand your—I presume you had this contract that was made by the Federal Works Agency or Federal Works Administrator, with Lytle and Green?

A. Yes, sir.

Q. Before you at all times in connection with the matter?

A. Yes, sir.

Q. Is that correct?

A. As soon as it was sent to me.

Q. Beg your pardon?

A. We did not receive a copy of it. I didn't have a copy of it when I went up there.

Q. But, you did——

A. It came later, yes.

Q. Yes, and that is the proposition you were working under, of course?

A. Yes.

(Testimony of C. G. Polk.)

Q. Now, and that was true also, was it not, with respect to the unit contractors?

A. Yes, sir.

Q. They did not have independent, but they had direct contracts with the government? [154]

A. Yes, sir.

Q. But they were subject to the general supervision of the project manager—that is, Lytle and Green Company?

A. Yes, sir.

Q. And they in turn, representing the government, the owner so to speak. You gave the instructions to Lytle and Green, that is, their foreman or superintendent or representative on the job, is that correct?

A. To Lytle and Green's foreman.

Q. You were not their foreman, but their representative?

A. The contractors or their representatives, or——

Q. Yes, you did not go and tell the pick-and-shovel man what to do?

A. No, no.

Mr. Sager: Let him finish his answer.

A. (Continuing): Of course not.

Q. But when you wanted a piece of work accomplished, I take it, you took it up with somebody who presented Lytle and Green, or somebody who represented the unit price contractor and told him what you wanted done, or your engineers did?

A. Well, ordinarily our men would take it up with the foremen.

(Testimony of C. G. Polk.)

Q. Well, I want to get—yes, somebody who had charge of the work for the unit price contractor, or project manager?

A. Somebody in authority.

Q. Somebody in authority? A. Yes.

Q. Yes. Now, there were about twelve hundred men employed [155] by Lytle and Green and the unit contractors, is that correct?

A. I think I said twelve hundred awhile ago, but after a little more thought were were a few more than that. There probably would be thirteen hundred.

Q. Probably thirteen hundred. That is not important anyway, that number, whether there was twelve hundred or fifteen hundred were working over what area—I mean, in length, of the highway, we will say, in——

A. Well, that would be the sum of the distance is shown on those four sections on that Exhibit 10. That would be about three hundred and fifteen miles.

Q. About three hundred and fifteen miles, and I presume each unit price contractor had proper camps established to take care of his men?

A. Well, they were camps, but they were not proper——

Q. Well, they had camps anyway. We will let it go at that. A. Yes.

Q. And they were put up I assume by the contractors? A. Yes.

(Testimony of C. G. Polk.)

Q. They had more or less transportation in there, did you not? A. Yes, sir.

Q. And that was of course all heavy materials, at least was by truck? A. Yes.

Q. And who attended to the transportation job?

A. There was one contractor assigned to transportation.

Q. A man named Hoke?

A. That is right. [156]

Q. Yes, and as the work progressed, I assume you used part of the finished or partly finished roadway for the purpose of transporting over it, was completed, I assume? A. Yes, sir.

Q. And that continued right along until the job was completed, I assume? A. Yes, sir.

Q. Now, that—all that country up there was through a virgin country, so to speak, was it not?

A. Yes, sir.

Q. It was pretty much the same, as far as that is concerned, probably pretty much the same with respect to road construction? A. Yes.

Q. You didn't have much—it was tunder or those muskeg—some of it was tunder and muskeg bogs, and other was just ordinary ground, or was there any ordinary ground up there?

A. Oh, yes, there was a lot of ordinary ground. There was very little tunder under the road. We bypassed that.

Q. That involved cutting of timber and falling of trees and clearing of right of way and grading and excavating and blasting, and all those things?

(Testimony of C. G. Polk.)

A. Yes.

Q. Yes. Now, you say the Lytle, if I understood you correctly, that is, if I attempt to misquote you you can correct me, I understand that the Lytle-Green organization itself had about two hundred and fifty men?

A. I may have been——

Q. Well—— [157]

A. ——a little too many on that. It was probably less.

Q. Maybe two hundred, whatever it was?

A. Yes, sir.

Q. What were those men engaged in, not in detail, but generally?

A. In purchasing, in preparing vouchers, in warehousing and all the dozens of different——

Q. Do they do any grading?

A. No, no grading.

Q. Did it take two hundred and fifty men to do the clerical work and warehousing for this two hundred, or whatever it may have been?

A. Yes, it did.

Q. Various unit price or unit, rather, contractors employed cooks and maintained cook houses to feed the men?

A. Yes, sir.

Q. Yes, and Lytle and Green, I presume, did the same thing as far as their employees were concerned?

A. Yes.

Q. And this man Hoke was under the—he was a unit price contractor, or rather, he was a man brought in there by Lytle and Green and was under them, is that correct?

(Testimony of C. G. Polk.)

A. I didn't get that last question.

Q. The man Hoke, the individual, was a man brought in there by Lytle and Green, was he not?

A. Well, he was—his contract was the same as the others.

Q. I understand, but he was on the same basis as the other unit contractors under Lytle and Green, except he had the transportation end of the thing?

A. That is right. [158]

Q. And what character of equipment generally was used up there, bulldozers, and shovels?

A. Bulldozers and carryalls mainly.

Q. Generally dirt-moving equipment?

A. Yes, and trucks.

Q. More or less blasting, I assume, carried on at different places?

A. Very little blasting.

Q. Wherever it was necessary it was done, of course?

A. Yes.

Q. Now, each unit man, I take it, attended to his own crew—each unit contractor had his own crew of I think you said something like sixty?

A. Yes, sir.

Q. And he provided a superintendent or foreman to direct those men in their work, is that correct?

A. Well, he recruited these men. They were all Civil Service.

Q. Well, let's forget about the Civil Service business, I am not asking you about.

A. No.

Mr. Sager: Well, I don't think it ought to be forgotten.

(Testimony of C. G. Polk.)

Mr. Peterson: I understand, but he recruited the men and brought them up.

Mr. Sager: Referring to employees of the contractors right along, probably making a distinction.

Mr. Peterson: Well, I didn't mean to say—I was not speaking in a legal sense they were employees.

Q. But, you didn't have anything to do with recruiting these [159] men? A. No.

Q. Down in Iowa and Nebraska? A. No.

Q. Each unit price contractor—I just want to start into another part.

The Court: Finish your question.

Q. Each unit price contractor brought his own crew in there? A. In general, that is true.

Q. Yes. And do you know generally where those men were employed—were from, in your activity around there? A. The source?

Q. Yes. A. In Iowa, the State of Iowa.

The Court: We will take an intermission now until 2:00 o'clock this afternoon.

(Recess.)

2:00 o'clock P. M.

The Court: You may proceed, now, Mr. Peterson.

By Mr. Peterson (Continuing):

Q. Mr. Polk, these unit price contractors—or not unit price, pardon me, but the unit contractors

(Testimony of C. G. Polk.)

Lytle and Green furnished considerable of their own rolling stock and equipment, did they not?

A. A considerable amount, yes, but not all of it.

Q. And as I understand under this contract, the Lytle and [160] Green, who were—they were referred to as project managers, were they not?

A. Yes, sir.

Q. Yes, and I understand under the system of operation there, they allocated the portions of the work to these respective individual contractors, and those allocations I assume had your approval?

A. Well, they allocated.

Q. Beg pardon?

A. They allocated the contractors to the various sections, subject to our approval, yes.

Q. Yes, and they, the Lytle and Green organization, supervised and controlled the individual contractors with respect to the management of the operations, did they not, and the work performed by them?

A. Well, theoretically, maybe they did, but actually they did not. They did not have the personnel.

Q. Beg pardon?

A. No, that is not entirely true. They did not have the personnel to supervise all the various activities.

Q. Well, so far as they had the personnel they did?

A. Well, subject to approval of the Public Roads, yes, that is true.

(Testimony of C. G. Polk.)

Q. And they maintained a central office there, did they, under the contract? A. Yes, sir.

Q. There has been a contract introduced in evidence here—I don't know what the exhibit here——

The Court: A-6, Defendants'.

Q. By the government, and is the contract between—let me [161] show the witness that, please. I think maybe you can tell by looking at this copy. I would rather have you look——

The Court: The Court has one copy. That is the copy of the contract between the plaintiff and the defendant.

Mr. Peterson: That is the one I wish.

The Court: Between the defendant and the government?

Mr. Peterson: Yes, that is the one, Your Honor. I want to exhibit it to the witness, please. Just let the witness look at that, I know what it is.

Q. The front sheet is not a part of it.

A. Yes, I understand.

Q. That is Exhibit A-2, is it, Exhibit A-2?

A. A-6.

Q. A-6. Well, I beg your pardon, this is a copy of the contract you had up there?

A. Yes, sir.

Q. And I presume in the performance of your duties you followed that contract, did you not?

A. As much as possible.

Q. Yes. Well, you did not change the prices of anything? A. No.

(Testimony of C. G. Polk.)

Q. You did not change the arrangements—you did not substitute some person who is not a party to this contract—who was not a party to this contract, for one who was? A. No.

Q. This generally controlled you, didn't it?

A. That is right. [162]

Q. Yes. You aimed to carry that out in the performance of your duties? A. Yes.

Q. Now, this contract provides, for instance, page 3, the project manager—that is Lytle and Green, shall supervise and control the individual contractors with respect to the management of their operations, the work performed by them, the furnishing and handling of their equipment and the supervision of the employment and discharge of their personnel. Is that—were those the functions of the project manager? A. Yes, sir.

Q. And it was carried on in that manner in accordance with the contract, wasn't it?

A. In most instances in the case of the supervision of the contractors they had, but one engineer up there, and he couldn't very well cover three hundred and some miles.

Q. Yes. Well, they sent some four or five men out to put a blast under a stump, you did not interfere with that business? A. No.

Q. That was up to them, so to speak?

A. That is right.

Q. Now, did they provide and maintain a central office up there, and operate that? A. Yes, sir.

Q. I beg your pardon? A. Yes, sir.

(Testimony of C. G. Polk.)

Mr. Peterson: I wish you would speak a little louder if you will, so everybody can hear you. [163]

A. Very well.

Q. Now, did Lytle and Green provide and maintain and operate a central equipment repair depot?

A. Not during that period.

Q. Well, did they maintain a depot?

A. Yes.

Mr. Sager: Well, Mr. Peterson, the defendant was not during this period. There might have been some other time.

Mr. Peterson: Well, the contract provision I think is going to control, anyway.

Q. And there were repairs there, made between June 17th and August 1st, to trucks and various equipment?

A. To a certain extent most of them were performed by the individual contractors.

Q. Well, I am not talking about that. I am asking you if there were repairs made to trucks and equipment as to either the individual contractors or Lytle and Green?

A. To the individual contractors.

Q. Well, the individual contractors, if you want it that way.

A. Lytle and Green did not have any equipment of their own.

Q. All right, and those repairs were made by the individual contractors under their supervision?

A. During that period I believe they were.

(Testimony of C. G. Polk.)

Later on, Lytle and Green maintained a repair shop of their own.

Q. Yes, and they selected the men to do the repair and welding, or whatever it might have been, and the material to be used, and it directed the details of the work, that is correct, isn't it? [164]

A. No, I don't think that is right. That was up to the individual contractor.

Q. Well, I am talking about the individual contractor.

A. Well, if you were talking about that, that is correct.

Q. That is correct, and that is the way the thing was carried on all of the way through, as a matter of fact, wasn't it?

A. When I refer to contractors, I mean the contractors' organization, many of those contractors were not on the job. It was their organization that carried on.

Q. I understand, but from the beginning on June 17th, 1942, until the completion of the job, the general mechanics were performing the work and accomplishing and getting it done, and it was the same right from the beginning on through, wasn't it? A. I will agree to that, yes.

Q. Yes, and you were familiar on how the pay rolls were made, were you not, from the beginning to the end? A. Yes, sir.

Q. And those were all made by government checks, there wasn't any difference in that arrangement?

(Testimony of C. G. Polk.)

A. They were paid by government checks, yes.

Q. Yes. Now, as I understand the situation, each of these unit price or unit contractors was responsible for his own equipment, keeping it going?

A. Yes, sir.

Q. Yes. How many men did you have on this supervising this thirteen hundred men that you have referred to?

A. Well, I had a total organization of nearly one hundred and fifty men. [165]

Q. You had a hundred and fifty men?

A. But, they were not all supervisors.

Q. How many were supervising this thirteen hundred man job that Lytle and Green were doing?

A. Oh, probably forty.

Q. Forty. That was fifteen contractors?

A. Yes, sir.

Q. And you had three men supervising each contractor, is that correct?

A. No, on some of them they—we didn't have any.

Q. Then, Lytle and Green had somewhere between two hundred and two hundred and fifty men supervising?

A. Well, I will have to admit I made an error when I said Lytle and Green's organization was two hundred and fifty men.

Q. You may correct it.

A. I would say it was closer to a hundred and fifty.

(Testimony of C. G. Polk.)

Q. That they had a hundred and fifty men supervising this thirteen hundred men?

A. They were not all supervising it, their entire organization, yes.

Q. Well, bookkeepers and auditors. Now, if I understood you correctly, your direct testimony this morning, you said that the engineer—and when I say engineer I refer to the district—the government engineer, the man under your employ would give instructions, we will say in the morning to the foreman or superintendent or engineer of one of the unit contract men, is that correct?

A. Whoever was on the job.

Q. Yes. [166] A. Yes, that is generally.

Q. You did not go to the individual workman, the pick-and-shovel man and give him any orders?

A. No.

Q. And then you would look, I assume to the foreman or a man in authority, whoever the order was given to, to carry out the order?

A. Yes, sir.

Q. Yes——

Mr. Peterson: I think that is all.

The Court: I wanted to ask you a few questions. This Lytle and Green contract, for the particular part of the road here involved, was it in the nature of an over all contract or the various individual contractors or associate contractors?

A. Yes, sir.

The Court: And the estimated cost of the work of eight million some dollars, did that include

(Testimony of C. G. Polk.)

likewise the estimated cost on each of these associated contractors?

A. Yes.

The Court: Jobs?

A. It included all costs, as I remember, except fixed fee payments.

The Court: Then, in these associate contractors' contracts, where there is an estimated cost given, the aggregate of those estimated costs was—with perhaps some other items, would make the eight million dollars?

A. Yes, sir.

The Court: But these associated contractors [167] or individual contractors, whatever we care to designate them, each had a fixed fee in addition to the fixed fee paid Lytle and Green?

A. Yes, sir.

The Court: And Lytle and Green's work was a supervisory work?

A. Yes, sir.

The Court: Then, do I understand by that, that Lytle and Green had no direct employees doing the actual physical work of building the road, or the bridge, or whatever it might be under construction?

A. That is true, they had no employees engaged on actual work.

The Court: Have you seen this document that is marked—I can't recall the number of it offhand, which is submitted as a pay roll on this job, marked Plaintiff's Exhibit 10?

(Testimony of C. G. Polk.)

A. Yes, sir, it is not a pay roll, though. It is a summary of pay rolls.

The Court: By that do you mean that it does not necessarily include all of the work, or includes work in addition to that done on this section of the highway that is designated 1-A, and 2-A, or A-1 and A-2?

A. It is a summary of all the pay rolls incurred on the job in Alaska, between the period of June 17th and July 15th, but it is not an actual pay roll.

The Court: Well, did Lytle and Green have previous contracts on other sections of this highway?

A. No.

The Court: Nor subsequent contracts? [168]

A. No.

The Court: That is, to your knowledge?

A. No, they had no such contracts.

The Court: So their only interest in Alaska was in the construction of this section of the highway known as A-1 and A-2?

A. That contract was later modified, I believe, the following year—in the year 1943, but incidentally——

The Court: 1943?

A. Yes, sir, contracts for construction of airports throughout Alaska, under the—I believe it was same aeronautics authority with which I am not familiar.

The Court: If I understood your testimony this forenoon on direct examination when you submitted your own sketch of the highway, that was

(Testimony of C. G. Polk.)

there under construction, I understood you to say there was no work actually engaged in, in connection with Section 1-A or A-1 and A-2 until after some date in July?

A. August 1st was the day.

The Court: Or, until August 1st?

A. Yes, sir.

The Court: Well, if this document here, Plaintiff's 10, indicates payment made to workmen and employees prior to August 1st, it could not have been in connection with this job covered by the contract between the government and Lytle and Green, which is Defendants' Exhibit 1, or A-6 in this case?

A. That is true, the pay roll as indicated there does not cover any work done on Sections A-1 and [169] A-2, other than you might say overhead of pay roll of the men en route to Alaska.

The Court: Were you the district engineer or assistant district engineer in charge of this work?

A. My title was assistant construction engineer, and I had charge of the work in Alaska, that is right.

The Court: Well, did you or to your knowledge did any of your superiors either approve or require as reasonably necessary for the protection of the government, an insurance such as is here involved?

A. I do not think I am qualified to answer that. That was the function of our district office and I had nothing to do with it.

(Testimony of C. G. Polk.)

The Court: You had nothing to do with the insurance?

A. I had nothing to do with the insurance.

The Court: The reason I asked the question, in the form I did, is because of the copy of the contract introduced here, which is Defendants' Exhibit A-6. In Article 2, under the head of "Cost of the Work", subsection "H", provides that:

"Premiums on such bonds and insurance policies as the district engineer may approve or require as reasonably necessary for the protection of the government or the project manager" shall be items of cost or expense to be charged against the project, and the term district engineer would not necessarily include you, then?

A. No, it would not. [170]

The Court: Well, who would it?

A. Mr. Bright, is his name.

The Court: Did you have anything to do with certifying pay rolls on this project?

A. I certified to most of them, yes.

The Court: If I understand you correctly, now, you say you certified none prior to August the 1st, because there were none on the project?

A. Well, there were pay rolls covering the Civil Service employees that were sent to Alaska and assigned to these contractors, commencing from the time they left Iowa, which was, I believe, in the early part of June.

The Court: And did you certify those?

A. I did not certify any pay rolls prior to July

(Testimony of C. G. Polk.)

16th, was the first pay roll I certified. We prepared them, or caused them to be prepared there in our office.

The Court: But, at that time actual construction had not begun on these sections?

A. Not on sections A-1 and A-2.

The Court: Well, those were the only sections that are involved here, apparently? A. Yes.

The Court: I think that is all.

Mr. Peterson: May I have the policy of insurance that was introduced here?

By Mr. Peterson (Continuing):

Q. Mr. Polk, as I understand there was no other contract, or was there any other contract between the government [171] and Lytle and Green in effect between September—or June 17th, 1942 and September 1st, 1942, other than the contract, Exhibit 6, which you have examined?

A. That is right, as far as Public Roads is concerned.

Q. Yes, that is the only contract. They have some contracts now for airports and one thing and another of course.

A. I said they had then, but not on public roads.

Q. Now, just for convenience and to save time, I am going to ask you to read the endorsement No. 1 on the policy, Plaintiff's Exhibit 4. Read that list, having in mind after you have read that, I am going to ask you whether or not there were any other sub-contractors or unit contractors, or what-

(Testimony of C. G. Polk.)

ever you want to call them, on this job, between September 1st, or between June 17th and September 1st, '42?

Mr. Sager: Mr. Peterson, you are referring to the policy itself?

Mr. Peterson: I am referring to the policy which is in evidence.

Mr. Sager: The insurance policy?

Mr. Peterson: Yes.

The Court: The question is whether there are any other sub-contractors or unit contractors?

Mr. Peterson: Other than those names.

A. There were none other.

Q. Those comprehend and include all of them?

A. Yes, sir.

Mr. Peterson: Thank you.

Q. I don't know whether you are able to tell us or not, you [172] understood, of course, that the pay of these men begun down in Iowa and Nebraska, or wherever they were recruited?

A. That is correct.

Q. Yes, and so far as pay rolls then were concerned, you had nothing to do with certifying those, or did you?

A. Yes, in a way.

Q. Well, were you down there?

A. Well, neither were the men. It was after they left Iowa, they were enroute to Alaska.

Q. Well, I understand——

A. The pay rolls were all prepared in Alaska.

Q. They were all prepared up there. Just how was this pay roll business handled, what is the first

(Testimony of C. G. Polk.)

you were furnished, the data by the unit contractor, or your office?

A. They furnished the data to Lytle and Green, their organization, who prepared the pay rolls, following which we audited them.

Q. Yes. What you received, you received from Lytle and Green? A. Yes.

Q. Because they were the general supervisory management contractors? A. Yes.

Q. And you acted on that information?

A. Yes, sir.

Q. Your office. I suppose those matters of audits and things of that kind, you left that to your auditors and others under you? [173]

A. Mostly, yes.

Mr. Peterson: Yes.

The Court: The Court will take a short recess at this time of fifteen minutes.

(Recess.)

Q. Now, I understand, Mr. Polk, that the actual moving of earth and material and so on commenced on July 7th on this job?

A. Yes, that is true.

Q. Yes. Up until that time men and equipment were being moved in and gotten in there, is that correct? A. Yes, sir.

Q. Yes. Now——

The Court: Well, let me get this straight. I have got a note here, I thought in answer to my question work actually commenced August the 1st.

(Testimony of C. G. Polk.)

A. Work began on August the 1st on Section A-1 and A-2, but work started on July 7th on another end of this road, the other end of the Alaska road.

The Court: We are only concerned with Section 1-A or A-1 and A-2.

A. Well, then, may I correct my statement, then, August 1st then was the date work started on Section A-1 and A-2.

Mr. Peterson: Yes.

Q. And at that time there was—the pay roll was begun as I understand you, when the men were recruited down in the States, is that correct? [174]

A. Well——

Q. Well, do you know, now?

A. They didn't go on the pay roll until they actually left Iowa.

Q. I understand, but when they got on the train, did you know then they went on the pay roll, didn't they? A. Yes.

Q. Then they were on the pay roll on the moving period and travel up and getting up there?

A. Yes.

Q. And getting into a bunk house, until they were ready to go to work? A. Yes.

Q. Yes, that is correct, and they were brought up there under this contract, Exhibit 6?

A. Yes.

Q. That is correct. Now, there wasn't anything done any place, anywhere, until July 7th, 1942, is that correct?

(Testimony of C. G. Polk.)

A. As far as the road is concerned, yes.

Q. Yes, and then after that period there were men coming in, I assume, and worked?

A. Yes.

Q. Yes, and they were recruited down in the States? A. Yes, sir.

Q. And their pay commenced down in the States? A. Yes, sir.

Q. That is correct, and there was equipment being moved in from Tacoma and Seattle and points in Iowa that kept coming along for a time?

A. Yes. [175]

Q. And there were employees necessary of course, outside of Alaska, in connection with marshalling and getting ready the supplies and equipment and so on, and getting it up there?

A. Yes.

Q. Yes, and that continued right along through the whole job, as far as that is concerned?

A. Yes.

Q. And they were what you so-called Civil Service employees until March some time in 1943?

A. Yes, sir.

Q. Yes, and they are all reported, I take it, on this pay roll of Lytle and Green?

A. Pardon?

Q. The wages of all those men were reported on this pay roll of Lytle and Green?

A. They were all reported on that pay roll, yes.

Q. Are you acquainted with these symbols?

A. Most of them, yes.

(Testimony of C. G. Polk.)

Q. All right. What is the——

Mr. Peterson: May I be permitted to stand by the witness?

The Court: Yes, for the purpose of pointing out.

Mr. Peterson: Thank you.

Q. Looking over on the first column to the left, what does two four mean?

A. Frankly I do not know.

Q. All right, then, the next is the name of the workman?

A. The name of the workman. [176]

Q. And then, what is this, please?

A. That is title.

Q. That is title?

A. Given a certain number, that indicates different jobs.

Q. Shovel runner or pick and shovel?

The Court: Right there I would like to ask, do those titles indicate whether they were a part of the organization of Lytle and Green or any of the unit contractors, or whether they were those Civil Service employees?

A. No, they do not indicate that.

Q. There is no way on that exhibit to distinguish between the two groups of employees?

A. Well, they are all Civil Service, every one of them.

The Court: You testified a couple of times there was somewhere around two hundred or two hundred and fifty people there that were part of the Lytle and Green organization?

(Testimony of C. G. Polk.)

A. Well, they were Civil Service.

The Court: They were the same as the workmen? A. Yes.

Q. Now, and going over to the column Service, "U.N.C.?"

A. That refers to unclassified service.

Q. Oh, that is unclassified service. Then the next column, what is this? A. Symbol.

Q. Symbols?

A. "7" indicates that he is on the hourly wage. I believe "4" indicates on a monthly wage.

Q. And then the rate, of course, that is self-explanatory. [177] This is correct?

A. That is time units, those are all hours.

Q. Those are hours. And then the gross pay, that is? A. Deductions.

Q. Deductions, those are—we are not much concerned about that. And then the net pay. Now, there is something over here on the right?

A. Well, I think I can explain to you this, the first one is Section.

Mr. Sager: I don't hear too clearly.

Q. Over on the right-hand column, there is a figure "6"—what does that indicate?

A. That refers to the month that the man was appointed.

Q. Oh, and that is when his pay begun?

A. Well, that month, it does not show the date, it just shows he was appointed in June, 1942.

Q. That shows he went to work in June. Does that show he got on the pay roll in June?

(Testimony of C. G. Polk.)

A. Yes.

Q. And what is one—what are those other——

A. The one eight refers to our district numbers. We have various districts throughout the United States, numbered from 1 to 18.

Q. What does one eight mean?

A. District 18.

Q. Where is that? A. Alaska Highway.

Q. Well, that pertained just to the Alaska Highway? A. Yes.

Q. If he did not start work with a pick and shovel? [178] A. No, but he was assigned.

Q. I understand you, but that character “NQ” indicates he was assigned to this Alaska job?

A. Yes, sir.

Q. Now, what are the other “six, oh, oh”—well, I will let you decipher that.

A. Well, the “6” indicates the type of work he was on, whether it was construction or surveys or maintenance. It is just another symbol. “6” is the symbol for construction.

Q. What do the ciphers mean?

A. Well, the next four refer to the contract.

Q. “Oh, oh, oh, two?”

A. Three “oh’s” and a “two” refer——

Q. What contract does that refer to?

A. Lytle and Green.

Q. That refers to this contract that is in evidence, is that correct?

A. Yes, and the next one you will notice is “oh, oh, two, oh, oh.”

(Testimony of C. G. Polk.)

Q. Wait a minute, pardon, there is "four, nine" over at the end, what does that mean?

A. Well, that is the state. They have assumed the state number of Alaska is number 49.

Q. Now, you are not able, I take it, you are able from the Exhibit 10 and the symbols on it to state that this work was done under the Lytle and Green contract, Exhibit 6 that you have seen, Defendants' Exhibit 6, is that correct?

A. Yes, sir, I can identify these. [179]

Q. Yes, you can identify that, but I don't suppose to be perfectly fair with you, Mr. Polk, you are able to tell us what part of that pay was drawn for services performed in Alaska or elsewhere?

A. I think I could.

Q. You think you could?

A. It would be an awful long tedious job, though.

Q. Well, I don't like to impose any hardship on you, but obviously the amount of that, I think it is computed there on the bottom, the amount in dollars and cents of pay roll, is it?

A. Yes, there is a penciled total here.

Q. Yes, what is that, please, will you read it to us? A. \$309,821.42.

Q. Assume that is the correct total, I don't know that it is. I did not add it, but let's assume it is correct, and that if you will turn the pay roll over and look on the front sheet you will see to July 15th? A. Yes.

(Testimony of C. G. Polk.)

Q. Yes, and you begun work on July 7th, moving earth up there in Alaska some place?

A. Yes.

Q. Yes, it is quite obvious then that a large part of that pay roll was pay roll of workmen starting down here in the United States, and so forth and so on? A. Yes.

Q. Yes, and you don't know, as far as pay roll is concerned, it shows that it was under this contract, but it don't show what amount was incurred subsequent to July 7th? A. Oh, no. [180]

Q. July 7th to July 15th? A. No.

Q. No. Now, about what was the monthly pay roll up there, do you recall, approximately?

A. About half a million a month.

Q. About \$500,000.00 a month. That would be \$125,000.00 a week, roughly? A. Yes.

Q. Now, just estimating—now I am not going to try and tie you down to anything—

Mr. Sager: I don't think this is material. I see what the purpose is, they are now attempting to show they are entitled to a premium on the basis of the clause which provides that where a pay roll is not supplied, they get fifty per cent of the whole cost of the contract.

Mr. Peterson: You are entirely mistaken about that.

The Court: I shall overrule the objection and allow him to answer, because the very nature of your defense is, Mr. Sager, if either of them are sustained, of course it overthrows the account

(Testimony of C. G. Polk.)

stated, and makes a recovery based upon the amount actually shown to be due if any.

Mr. Sager: Well, but this does not go to develop that.

The Court: I take it the question goes to the issue as to how many of these people on this pay roll actually performed services on the job, and others performed—others have time credited to them from the date [181] that they were notified they were employed and left the place of recruitment for service in Alaska, which the Court would judicially notice if the period of time were substantial.

Objection will be overruled.

Mr. Sager: Allow an exception.

Q. Taking into consideration what the operation was up there, and what you know about it, the cost per week, per day, per month, what portion of the pay roll of \$309,000.00 we will call it, a pay roll that you have before you, assuming the figure is correct, would you say accrued between—accrued between or was contracted, maybe that is the better word, between July 7th and July 16th?

Mr. Sager: If Your Honor please, I would like to suggest this. I have got the entire certified pay rolls for this whole period here, segregated here as to contractors. Now, I did not offer them in evidence because Mr. Peterson has been objecting to cluttering up the record, but if you want the actual figures on the pay rolls here segregated as——

(Testimony of C. G. Polk.)

The Court: Mr. Peterson, why do you take those dates July 7th and July 16th?

Mr. Peterson: Your Honor, I take those dates because under the policy it is provided that the premium shall be paid on the pay roll on all operations performed at, from, or in connection with the construction of approximately 155 miles of Alaska highway from Slana, Alaska, to the Canadian line.

Now, obviously, if there was \$200,000.00 of [182] pay roll expended here in getting men and recruiting men, and getting them on the job, there would be, if Your Honor should take the position, which I do not think you can under the law, that it only applied to this 155 miles, then Iowa and then any place outside of Alaska is elsewhere, and if there is \$200,000.00 of pay roll in moving men up there, then that would clearly come within the terms of the policy, just as much as this 155 miles.

Now, the witness says that there wasn't any dirt turned in Alaska until July 7th, so that this pay roll of \$300,000.00 which was down to July 15th, a large part of it must have been incurred outside of Alaska in connection with this project.

The Court: He may answer.

A. The question is the percentage?

Q. Yes.

A. From July 7th to July 15th inclusive?

Q. July 7th to July 15th inclusive. I don't know whether that would include July 7th, but July 7th to July 15th inclusive.

A. I would estimate about 25 per cent.

(Testimony of C. G. Polk.)

Q. Well, in dollars, express it, will you please?

A. \$140,000.00.

Q. \$140,000.00.

The Court: That is \$140,000.00 of that pay roll is for work that was actually performed on the job?

A. In Alaska.

The Court: In Alaska. [183]

A. But not on the—necessarily on the contract. It was on Section A-3.

Mr. Peterson: I think I can clear that up, Your Honor. I understand of the \$309,000.00 you consider that a hundred and—you consider that all of the \$140,000.00 excepting—or all of the \$309,000.00 excepting the \$140,000.00 were incurred getting the men up to the job and getting them on the job?

A. Yes, that is my estimate.

Q. That would make about \$160,000.00, something like that, or a hundred and seventy?

A. Yes, sir.

Q. Yes. Now. Mr. Polk, it is assumed—I am going to ask you to assume that the pay roll under this contract of Lytle and Green and these various unit price contractors between July 16th, 1942—no, strike this out.

From July 16th, 1942 to July 31st, 1942, was two hundred and fifty thousand, eight forty-two, ninety-four, and of those dates now, July 16th, 1942, to July 31st, '42, are you able to tell us,—have you any means of telling us what portion of that was for pay roll actually in Alaska and for the pay roll—for the compensation of employees who were outside

(Testimony of C. G. Polk.)

of Alaska engaged in moving equipment, material, and so forth, in connection with the performance of this contract?

A. I would say that 99½ per cent represents pay roll of the men actually in Alaska.

Q. Have you any means of verifying that?

Mr. Sager: You asked him for an estimate.

Mr. Peterson: All right, I am examining the [184] witness, if you please.

Mr. Sager: How are you going to verify an estimate?

A. That pay roll is made out in Alaska, and audited by our auditors, and certified to by myself.

Q. Yes.

A. And I am rather familiar with them—with all Alaska employees. They were all in Alaska, with the exception of probably a few that were enroute at that time, but there were very few.

Q. Well, Lytle and Green had some men down here in Seattle didn't they?

A. They were not on that pay roll.

Q. Weren't they, these men that were engaged in loading material out of here, and supplies? I thought you said that all of Lytle and Green's outfit with the exception of two were these so-called Civil Service employees?

A. In Alaska, that is true.

Q. That was true in Alaska? A. Yes.

Q. What was it down here, you don't know?

A. No, I have no means of knowing.

(Testimony of C. G. Polk.)

Q. But, they were included in the pay rolls that they were Civil Service employees?

A. Well, they were not included in that pay roll that you are quoting from there.

Q. Well, I have not seen this pay roll, and I don't suppose you have?

A. Yes, I have seen it. I have seen the original. [185]

Q. Well, all right then, we will take up the next period from August 1st to August 15th, 1942. Assume the pay roll to all parties concerned to have been two hundred and fifty thousand, eight forty-two, ninety-four, will you tell us what part of that was earned—was paid to employees outside of Alaska?

A. It would be practically negligible, less than one per cent.

Q. And that you say is true with respect to all of the pay rolls, is that correct?

A. All of those major ones, in round numbers over a quarter of a million, that is true, of a quarter of a million, that is true.

Q. Yes. Mr. Polk, I wonder if you will be good enough to—if you have the matter available here, to tell us what the pay roll was for the 31st of July, 1942?

Mr. Peterson: The reason, Your Honor, I am asking that, is because the binder covers all activities, whether in Alaska or whether on this 155 miles, or any place, and it was superseded by a

(Testimony of C. G. Polk.)

policy on July 30th, so this one day may become important.

Mr. Sager: I object to that because the binder, of course, is no longer a contract. The contract that was issued on July 30th is dated back to June 17th, and becomes effective as of that date, and that is the contract that is sued on here.

Mr. Peterson: It was a contract until it was superseded.

Mr. Sager: It was superseded and incorporated into the present insurance contract. There is no liability [186] under the binder.

The Court: Of course, the policy of insurance provides that all operations performed after or in connection with the construction of approximately 155 miles of highway, and of course it depends upon what you gather in the way of thought from the language, "All operations performed in connection with the construction of the highway," and I assume the binder had similar language in it.

Mr. Sager: He proposes to show something now becoming broader.

Mr. Peterson: The binder contains the same language, but it is a little broader in its terms. Well, I won't ask you to do that if counsel thinks it is too much of a job for you.

Mr. Sager: I do not object because I think it is too much of a job. I object because there is no liability here, or any premiums under the binder—any premiums that are due under the insurance contract, not the binder.

(Testimony of C. G. Polk.)

The Court: I think that is correct.

Q. Now, Mr. Polk, the job outlined originally was 155 miles from the Canadian border to Slana, Alaska, is that correct? A. Yes.

Q. And when you went up there, you put in equipment at other places? A. Yes.

Q. Yes, and was that equipment—what is the reason you started in some other place other than on this 155 miles? [187] A. Pardon?

Q. What is the reason you started in some other place than this 155 miles?

A. Well, there was various reasons that entered into it; the army was the principal reason. They desired a road into Fairbanks rather than into Anchorage. At that time the original contract contemplated a road that connected with Anchorage.

Q. And where did you start work on July 7th?

A. Well, that particular operation was at Gulkana.

Q. Where is that with reference to Slana?

A. Sixty-three miles westerly.

Q. Westerly, and how long—then, where did your other operations continue?

A. On July 13th we started the—what is known as the Big Delta Junction.

Q. Where is that with reference to Slana?

A. Well, that would be 140 miles north of this other operation that started on July 7th.

Q. At Gulkana? A. Yes.

Q. I want to call your—

(Testimony of C. G. Polk.)

Mr. Peterson: I am through with the witness——

Q. Now, the contracting officer up there under this contract was the government, is that correct?

A. Pardon?

Q. The contracting officer under this contract was the government—was designated as the contracting officer, that was the Federal Works Agency, whatever it was?

A. Yes, or the head of it. [188]

Mr. Peterson: In that connection, Your Honor, I want to call the Court's attention particularly to Section 4 of paragraph—or paragraph 4 on page 5 of the contract, providing that work may be done—in providing that work may be done in any other section.

The Court: What paragraph is it now?

Mr. Peterson: That is paragraph 4 of page 5. Does that read—these copies are somewhat different.

The Court: This paragraph 2 apparently on page 5, "The contracting officer or his authorized representative"——

Mr. Peterson: Yes, I meant paragraph 4.

The Court: It is numbered 4, but it is the second paragraph on page 5.

Mr. Peterson: Yes. That is all.

Redirect Examination

By Mr. Sager:

Q. Mr. Polk, you referred to this Plaintiff's Exhibit 10, this pay roll purporting to be from the period——

(Testimony of C. G. Polk.)

Mr. Sager: Does this show the period of coverage, Mr. Peterson?

Mr. Peterson: Well, I am assuming that it does. It is marked at the top there you will notice, July 15th.

Mr. Sager: To July 15th?

Mr. Peterson: To July 15th—just a moment, and that ties in with the report they made to us, the first one they made to us. [189]

Q. Does this represent a pay roll of any one—I am referring to Exhibit 10—to any other than Civil Service employees? A. No.

Q. Now, you have referred to Lytle and Green organization and the other unit contractors' organizations. In referring to organizations or contractors, are you referring to the entire organization under the supervision of that contract, or only to the men who were not under Civil Service?

A. I don't believe I understand the question.

Mr. Sager: That is a difficult question, strike it.

Q. When you refer to the Lytle and Green organization, you mean just the Lytle and Green contract, or do you mean the entire group of men working up there under their direction?

A. Well, ordinarily I would refer to it as the entire organization.

Q. Did that include the Civil Service employees?

A. Yes, it would.

Q. Well, now, how many men did Lytle and Green have within its own organization in Alaska that were not Civil Service appointees?

(Testimony of C. G. Polk.)

A. I believe there were three, of which one left shortly after he came up.

Q. Of course, I will confine that also from the period of June 17th to August 30th.

A. The answer is the same.

Q. And all of this personnel they had up there, they were [190] working in the office, or wherever they were, outside of those three men were Civil Service appointees? A. Yes, sir.

Q. Under the same provisions that have been related? A. Yes.

Q. How many engineers did Lytle and Green have in Alaska during this two and a half months' period?

A. On their own construction activities they had but one.

Q. That is on this contract? A. Yes.

Q. Now, you stated that the work started up there on July 7th—that is, the actual construction. Were the organizations there in Alaska at that time?

A. Yes, they were all in Alaska at that time. Certainly no later than a day or two after that. I don't remember exactly, but there might have been up to July 9th, but all of them got there.

Q. And was there any substantial number of men coming in afterwards? A. No.

Q. Now, between July 7th and August 1st, where did—where were the organizations working?

Mr. Peterson: I think that has all been covered in direct examination, Your Honor.

(Testimony of C. G. Polk.)

The Court: He may answer.

A. At Gulkana and on Section A-3, the Big Delta Junction on Section A-4, and some men were loaned to the Alaska Road Commission for work on the Richardson Highway, a number of others were employed in Valdez, in unloading a boat, a number of others were engaged in camp construction. [191]

Q. Was this camp construction on Sections 1 and 2?

A. No; no, the camp construction was at the central headquarters at Gulkana, and mainly—although two or three were being built on this Section A-3, from Gulkana to Slana.

Mr. Sager: Referring to that same Exhibit, Plaintiff's Exhibit 10, I would like to approach the witness if I may.

The Court: Yes.

Q. Mr. Peterson asked you about these symbols back here which indicate the particular unit contractor that the man was working under. Does that symbol show for each man on the whole list?

A. Yes, sir.

Q. And does it show the various other unit contractors?

A. Yes.

Q. In other words, it shows whether he was a part of Lytle and Green organization or some other unit organization?

A. Yes.

Q. And do you know what these deductions on here are for?

A. Yes.

Q. What?

A. Board and lodging.

(Testimony of C. G. Polk.)

Q. Was there anything else included in the deduction? A. No.

The Court: Let me interrupt you here, Mr. Sager, just a moment. Why would these men be working on these other projects that you have just mentioned, if they were recruited for this particular work? [192]

A. Well, the primary reason is the entrance of the Japanese into the Aleutian Islands made the army decide that they had better concentrate on a road into Fairbanks, rather than into Anchorage, so they requested that we give priority construction to this so-called Section A-4.

The Court: And then the work that they did do on Section A-4, was not at all directly a part of Section A-1 or A-2?

A. It was not, no.

The Court: Nor not in connection with A-1 or A-2?

A. Well, they connect with them.

The Court: I know the road ultimately, but it was not in connection with that construction?

A. No.

The Court: If it had not been for this emergent condition that arose, would these men have been on the A-1 and A-2 job?

A. Well, at that time?

The Court: What I am trying to get at is, were the Lytle and Green directed men, whether they call them Civil Service or employees through the month of July up until August the 1st when construction

(Testimony of C. G. Polk.)

work began on the highway here in question, or were they men who had been brought for this job but by reason of the emergency were diverted to another job?

A. Well, they were diverted to this other job for the reason I explained, and also because we could not get into this section A-2 at that time or [193] section A-1. The army had a regiment of engineers in there, and they completely blocked entrance to the section.

The Court: But, the men, whether they came as Civil Service employees or employees of these project managers, left their homes in the States, wherever they were, and came to Alaska for the purpose of undertaking work on these two sections of the highway that are mentioned in the contract here?

A. Well, I don't suppose the men themselves knew what section they were going on. Just the Alaska Highway is all they probably knew.

The Court: But, Lytle and Green and the other unit contractors were recruiting men only for these two pieces of highway, if I understand the testimony correctly, insofar as they assisted in any recruiting work?

A. I suppose so.

The Court: Well, as the engineer representing the Public Roads Administration, didn't you know and didn't you testify they had no other contracts for construction at that time?

A. Yes, that is true.

(Testimony of C. G. Polk.)

The Court: I think that is all, Mr. Sager. I wanted to clear that up.

Mr. Sager: I want to ask a question which is probably not proper redirect. It should have been asked on direct examination.

Q. Mr. Polk, when there were any promotions or changes in the status or classification of these men, did you have [194] anything to do with that?

A. Yes, sir.

Q. Well, how did that come about, just explain it to us, the procedure by which that would be——

A. Ordinarily the management contractor sends to us a form for either discharge or promotion, which we acted on, either approved it or disapproved it, whichever was—seemed to be best for us.

Q. Did you actually disapprove any of those?

A. Oh, yes, that is, as far as promotions were concerned. I don't recall of ever disapproving any requests for terminations.

Q. You did disapprove requests for promotions or change in classifications?

A. Oh, yes, we investigated the case in nearly every instance.

Q. Now, when this equipment was repaired, did I understand it was repaired by the unit contractors or the Lytle and Green?

A. During this period from June to August, it was done entirely by the unit contractors and their men assigned to that—the Civil Service men assigned to them.

(Testimony of C. G. Polk.)

Q. That is the men who did the repair were under Civil Service? A. Yes.

Q. From August 1st to August 31st, how many organizations were employed on Sections A-1 and A-2, or this 155 miles? A. Two.

Q. And they were who?

A. E. M. Dusenbergh and Weldon Brothers.

[195]

Q. Were there any others on that section at that time? A. No.

Q. These two contractors, Dusenbergh and Weldon Brothers were the only ones on the 155 miles during the period from June 17th to August 31st, is that correct? A. Yes, sir.

Recross Examination

By Mr. Peterson:

Q. Mr. Polk, you say some of these men, we will say, went over to the Richardson Highway, that is your testimony?

A. We loaned some to the Alaska Road Commission, yes.

Q. Did the unit move over?

A. Well, you see, Gulkana, their hearquarters is right on the Richardson Highway, and it is in that vicinity that the work was done. They did not move them. They were already there.

Q. They did not move, but how was it done, did you assign a unit contractor to go on the Richardson Highway with his outfit?

A. No, as I recall it was taken up as a matter

(Testimony of C. G. Polk.)

of conference between the Alaska Road Commission and the Lytle engineer, and Mr. Falkendahl and myself, and we agreed to loan him some men for the period. We had very little activity. We kept them on our pay roll and later billed them on a transfer voucher.

Q. Well, when they went over there did you send three or four men to work under a boss of it, or did you send a foreman with a number of men? How was that done?

A. As I recall, it was mostly mechanics and a few bulldozer [196] operators, but I don't recall of any foremen being in there.

Q. You don't remember when that was done?

A. I don't believe the Road Commission wanted foremen. They had their own foremen.

Q. You don't remember when that was done, then? A. Yes, it was in July.

Q. But, you kept them on your—they were kept on Lytle and Green's pay roll? A. Yes.

Q. Now, you referred to this matter of discharge of men, and I understand the unit contractor would discharge a man and he would come to you and make up some kind of a slip or paper?

A. It would pass through the management contractor before it came to us.

Q. Oh, it went to him? A. Yes, sir.

Q. And then he approved it and then you okehed it? A. That is true.

(Testimony of C. G. Polk.)

Q. Yes, and were there many men discharged there? A. No, not very many.

Q. And then you sent your report down to the Seattle office? A. Pardon?

Q. You sent your report then down to the Seattle office?

A. We sent the necessary papers so they could terminate the appointments.

Q. Down to the Seattle office?

A. To the Seattle office.

Q. What became of the man, did he wait around there until it [197] was approved by the man in Seattle?

A. No, we got him out as fast as we could.

Q. He pulled out? A. Yes, sir.

Q. Now, when they hired a man up there, supposing he was a local resident, when they hired a man, who hired him? For instance, if Duesenberg wanted a man, who hired him?

A. Well, again that came through the management contractors to our office.

Q. Well, I mean who went to him and said, "Smith, do you want to go to work here on the pick-and-shovel?" Who contacted the man?

Mr. Sager: I submit he is not qualified to answer. He was not there.

The Court: If he was there, we don't know.

Q. Who actually hired the men and employed them?

A. I can answer that in a few instances of that, because they were always referred to our office first before any paper work was made out.

(Testimony of C. G. Polk.)

Q. Well, who contacted the man first?

A. The contractor.

Q. The contractor, and——

A.. It might have been the management contractor, though.

Q. Well, whoever it was, and then he got your okeh on it? A. Yes.

Q. Got your approval on it? A. Yes, sir.

Q. And then you put the man to work?

A. Prior to hiring him.

Q. Beg pardon? [198]

A. Prior to hiring him he got our approval.

Q. I understand he got your approval, and then you put him to work??

The Court: The point is, where, if the evidence would be relevant and have any value at all, did you require him to take the oath and meet all of the other requirements—fulfill the Civil Service classification. A. Yes, sir.

Q. After you had him in the Civil Service proposition, the Civil Service scheme was abandoned, wasn't it?

A. Well, it was abandoned the following year.

Q. All right, then what did you require him to do? A. The following year?

Q. Yes.

A. Oh, I see. The following year the contractor and the employee had an agreement between them. This paper is—for hire agreement, is a printed sheet setting out all the terms of the employment, and

(Testimony of C. G. Polk.)

to that is attached what is called an assignment of service form, which papssed on to the various organizations of the Public Roads Administration, and before the man could be placed on the pay roll that assignment to service form had to be approved by some one in charge of the work, for the Public Roads——

Q. I understand that before a man could go to work he had to have the approval of yourself or some of your subordinates in connection with the job, that is correct? A. Yes.

Q. And that was the same before, when you had the Civil ([199] Service business, except he had to sign up all these blanks, is that right?

A. Well, of course we had nothing to do with the hiring of these men in 1942. The contractor did that all himself.

Q. You did not hire any men down here in 1942, did you?

A. As far as I know, they hired them all.

Q. When were these men recruited in Iowa and Nebraska and that area, when were they recruited, in what month in 1942?

A. In '42 I would say they were recruited in May and June.

Q. Where were you in June?

A. I was in Alaska.

Q. Yes, and you did not contact any of these men? A. No. I did not.

Q. No, and you did not order any particular individual recruited, did you, or your organization?

(Testimony of C. G. Polk.)

A. Not in the United States, I did not. We ordered a few from Alaska.

Q. Well, those were just occasional?

A. That is right, just a few.

Q. And on these promotions, promotions usually involved an increase in pay, I take it?

A. Yes.

Q. And those matters would come up to your organization and you would approve or disapprove?

A. Yes.

Q. Yes, it was really a cost plus government job, the government was making the pay rolls?

A. Yes.

Q. Yes. Do you know how this Civil Service business came [200] about to begin with?

A. No, I am not qualified to say that.

Q. You don't know?? A. No.

The Court: Let me ask you there, Mr. Peterson, were these men in organized labor unions at any time they were on these jobs? A. No.

The Court: Even when they went over into private recruitment in '43? A. No.

Mr. Peterson: There aren't any labor unions, or there were not any up in that section of Alaska?

A. Not to my knowledge.

Mr. Peterson: I think that is all. Thank you.

Redirect Examination

By Mr. Sager:

Q. This hire agreement that you mentioned, Mr. Polk, was that a government form or government blank?

(Testimony of C. G. Polk.)

A. No, that was prepared for the management contractor.

Mr. Sager: I think that is all.

Mr. Patterson: That is all.

(Witness excused.)

Mr. Sager: Pardon me just a moment. I think I am going to offer at this time certified copies of the pay roll of Duesenberg, Inc., and Weldon Brothers. [201] I started to do that once before and withdrew them because of the stipulation, but in view of the testimony that—the testimony that no work was commenced on these two sections of the road until August, and this pay roll covers a greater period or a period earlier than August, I think I will introduce it to show the amount credited for the period of from August on?

The Court: And the pay roll that you are now offering, covers the period in July?

Mr. Sager: Well, it covers the whole period, apparently.

Mr. Peterson: I understand this pay roll on the 155 miles——

Mr. Sager: This is the pay roll on everything during the time they were there.

Mr. Peterson: This is the matter regarding which we stipulated this morning. I don't like to encumber the record.

Mr. Sager: I will explain. My only purpose at the time we stipulated this morning, we stipulated the entire pay roll of these two contractors.

The Court: You stipulated that one of them had

a pay roll of a hundred and two thousand three hundred and some dollars and the other pay roll of seventy-one thousand and some dollars.

Mr. Sager: That is correct. These are the two contractors he testified worked on sections 1 and 2 during this period, and the only portion of that period they worked on the sections 1 and 2 was from August 1st until August 30th. Now, the totals we stipulated this [202] morning cover the greater period of that. That is the only period I want to correct, they gave a period in the case of Duesenberg from July 1st to August 31st, and in the case of Weldon Brothers from July 16th to August 31st.

The Court: And do they disclose where Dusen-berg worked during July, where the men with him worked?

Mr. Sager: Do they show that, Mr. Polk, do all these pay rolls of Dusen-berg and Weldon Brothers show where the men were working in the sections during July?

Mr. Polk: No, they will not.

The Court: I don't see they would be any aid, if added to the stipulation.

Mr. Sager: Because, if they were not working on these sections of the road before August 1st, and we stipulated for July——

The Court: You have not stipulated for July. You stipulated for August.

Mr. Sager: The figures I gave you covered the whole period.

The Court: \$102,000.00?

Mr. Sager: Yes, from——

The Court: Well, I got this witness' testimony,

I have got it under his testimony that there was \$102,384.00 work done by Dusenbergs on this contract in August, A-1 and A-2, and Weldon Brothers, \$71,357.00.

Mr. Sager: I think that was our stipulation, rather than testimony.

The Court: Well, the question was asked here [203] just this afternoon, either by the Court or one of counsel.

Mr. Sager: Well——

The Court: Now, if it is other than that, I want to get it clear.

Mr. Sager: That is the point. Take the stand again, Mr. Polk.

C. G. POLK

resumed the stand, was examined further and testified as follows:

Mr. Sager: Perhaps I can show these to Your Honor and you can get the point I am driving at. These little slips I have attached to them, are Mr. Polk's computation from the file, showing the date and the amount taken from the pay roll for each period.

The Court: Well, then, these little slips indicate that the work done from July 1st to July 15th, twenty-three thousand some odd dollars, was done elsewhere than on this job. Are these your figures?

A. Those penciled figures are mine, yes, sir.

The Court: Well, there is a date fixed there in July?

A. Those dates refer to the pay roll period.

(Testimony of C. G. Polk.)

Redirect Examination

By Mr. Sager:

Q. The Court now wants to know whether in July that figure indicates that the work was done in Sections 1 and 2?

A. It couldn't have been done on Sections 1 and 2, because [204] they did not enter that work until August 1st.

Mr. Sager: That is the point I am trying to establish, that the only part of those pay rolls attributable to those pay rolls is from August 1st on.

The Court: Well, according to your calculation, in order that the Court can get this matter clear in mind, what was the work done on this contract or these pieces of highway which these two contractors that you say were the only two that did any work on the actual construction——

Mr. Sager: The amount, Your Honor, please?

The Court: Yes.

Q. Can you tell that from those figures, Mr. Polk?

A. It will be the sum shown after August 1st on those penciled slips.

Q. Would you read and get those, and read what they are?

A. Weldon Brothers, the period of 8-1—August 1st, to August 15th, the pay roll of \$18,562.22.

The period August 16th to August 31st, the sum of \$19,145.88.

The Court: What was the first period, eighteen thousand what?

(Testimony of C. G. Polk.)

A. Five hundred and sixty-two dollars and twenty-two cents, and in addition there are two small supplemental pay rolls, shown one from August 1st to August 31st, \$155.47. Another one covering August 1st to September 30th, in the sum of \$86.00, and that is the total amount covered by these pay rolls.

Q. That is Weldon's?

A. On Weldon's, on Sections A-1 and A-2 during that period. [205]

The Court: There are approximately \$37,862.00, that is only an approximation?

A. Yes. On E. M. Dusenbergs, the pay roll, August 1st to August 15th, amounted to \$26,094.23. From the period August 16th to August 31st, there is a pay roll of \$12,873.63.

Mr. Peterson: Twelve eight—

A. Twelve eight seventy-three and sixty-three cents, during that same period, August 16th to August 31st.

There is another pay roll amounting to \$13,055.31, and we have shown small adjustment pay roll, from August 1st to August 31st of \$81.07. And that is the total amount of pay roll that Dusenbergs incurred prior to August 31st, on Sections A-1 and A-2.

The Court: If my figures are correctly—approximately fifty-one thousand?

A. Approximately fifty-one thousand.

The Court: That is all.

(Testimony of C. G. Polk.)

Mr. Sager: With that explanation, then, I withdraw the offer.

(Witness excused.)

Mr. Sager: The defendants rest.

Mr. Peterson: I would like to ask the witness a question. You don't need to go on the stand, and it doesn't need to be in the record, if I may.

I want to ask Mr. Polk to be prepared in the morning to give us the estimated amount of the various [206] unit contractors, if he can conveniently. Will you do that, please?

Mr. Polk: Yes, sir.

The Court: Yesterday morning there was some statement made by certain documents and other entries made, to be made in connection with submission of interrogatories.

Mr. Sager: They have not come yet, Your Honor. I hardly anticipate them yet. They were to be mailed the day we started here in Sioux City.

The Court: Mr. Peterson, how much time will your rebuttal take?

Mr. Peterson: Well, I could finish this afternoon, Your Honor. I may not.

The Court: It was in response to your own interrogatories that you submitted, that you asked for certain documentary evidence, and they are not here yet and I just wondered if you wanted to have them to use in your rebuttal?

Mr. Peterson: Your Honor, I would want to look at the interrogatories and the documents,—

look at the paper or at the list before I want to answer that question. It may be that I will waive those and close the plaintiff's case, but I wish to look at them first, and what is the condition of Your Honor's calendar for tomorrow?

The Court: I think we have—we can proceed with this case, unless we have naturalization in the afternoon. We might be compelled to adjourn early. We will have to finish by the morning. It is open. [207]

Mr. Peterson: I think I will be able to let Your Honor know before the Court convenes tomorrow, and Mr. Sager.

Mr. Sager: Do you propose to go further yet this afternoon, Your Honor?

The Court: No, since we have to go over, I think that—I think maybe we will adjourn over until 10:00 o'clock.

Mr. Peterson: May I inquire of the witness who is in the navy as to his position?

Your Honor, Mr. Miller, whose testimony will be very short, is in the Merchant Marine, and he advised me his duties in the service prevent him—he will be here in the morning. I wonder if I can put him on. He will be short about it.

The Court: Yes.

L. C. MILLER,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. L. C. Miller.

Q. Mr. Miller, what was your occupation in April and May of 1942?

A. I was special agent for Hansen & Rowland.

Q. You are now in the United States Navy, or Merchant Marine? [208]

A. Maritime Service.

Q. Do you know Mr. Harvey Rice, of C. F. Lytle Company? A. Yes, I do.

Q. I will ask you whether or not you contacted C. F. Lytle, the defendant, C. F. Lytle Company and Green Construction Company in connection with this insurance coverage on this Alaska contract? A. Yes, sir.

Q. Where did you contact them at?

A. Sioux City, Iowa, and Des Moines, Iowa.

Q. Who did you discuss the matter with?

A. Mr. Harvey Rice and the officiating manager of the Green Construction Company was not in Des Moines, but I talked to the man in charge when I was there. I don't recall his name.

Q. Now, I will ask you whether or not Mr. Rice informed you or anybody of the Lytle Company as to the extent and magnitude of this job?

A. Yes, we did discuss it.

(Testimony of L. C. Miller.)

Q. Yes, and state whether or not Mr. Rice made known to you the—well, just a minute—strike that out.

Who was giving attention to this insurance matter on behalf of the defendants Lytle and Company and the Green Company? A. Mr. Rice.

Q. Yes. Did Mr. Rice—ask you whether or not he made known to you their requirements with respect to insurance in connection with this matter?

A. Yes, he did.

Q. And ask you also whether or not he made any statements [209] and representations to you if any with respect to the extent of the pay roll that was expected to be covered here? A. Yes.

Q. What did he tell you in that connection?

Mr. Sager: I object to that, Your Honor. I do not see its materiality.

The Court: Objection will be overruled. Rice is a representative of the defendant corporation, and a conversation had with him——

Mr. Sager: The extent—the anticipated pay roll—the pay roll is in here. What he said he thought it would be——

The Court: He may answer.

Mr. Sager: Exception.

A. He estimated the pay roll to be approximately seven to seven and a half million dollars on the entire project.

Q. I will ask you whether or not that estimate was given to you in determining—in connection with estimating what the premium would be?

(Testimony of L. C. Miller.)

A. It was.

Q. Yes, and you were familiar with this policy after it was issued? A. Yes, sir.

Q. I will ask you whether or not the policy conforms to his request in the matter?

A. Yes, it did.

Q. I ask you in connection with your discussions there, was the coverage of these unit men—unit contractors also discussed? [210]

A. Yes.

Q. Was there anything said to you about Civil Service then? A. Nothing.

Mr. Peterson: Cross examine.

Cross Examination

By Mr. Sager:

Q. When was this conversation with Mr. Rice?

A. Approximately the latter part—

Mr. Peterson: Just a minute, there is another matter, pardon me.

Direct Examination—(Resumed)

By Mr. Peterson:

Q. How long were you around Sioux City, Iowa?

A. I was in that neighborhood approximately three weeks, I believe.

Q. Yes, and I ask you of your own knowledge, do you know how these men were recruited there, or part of them at least?

A. I saw a little indication of that recruiting program in Sioux City,—in Des Moines when I

(Testimony of L. C. Miller.)

called there. I spent some time in the office waiting for the manager, and waiting for him.

Q. In what office?

A. In the office of the Green Construction Company. They had a large room where they were interviewing men for the Alaska road job.

Q. You say "they," who were "they?"

A. The Green Construction Company. [211]

Q. Well, who were the individuals, were they government men or men known to you to be employed in the construction company?

A. That I cannot say. I did not talk to the people who were interviewing the men. I talked to one of the men. He said he had been hired that day, and was on his way to Alaska.

Q. Don't tell us what somebody told you.

Mr. Peterson: That is all.

Cross Examination

By Mr. Sager:

Q. You don't know, of course, whether these men employed in recruiting had been appointed under Civil Service or not, do you?

A. I cannot say that, no.

Q. Were you interested in this contract of insurance at the time it was issued, or we will say, in June, did you know about it then? A. Yes.

Q. Did you know when the binder was issued?

A. I can't recall the exact date, but——

Q. Were you more or less familiar with the negotiations leading up to the issuance of the policy and the issuance of the——

(Testimony of L. C. Miller.)

A. Somewhat, yes.

Q. Do you know Mr. Northrup?

A. I met him once.

Q. When was that?

A. I believe the latter part of June. [212]

Q. Was that in connection with this policy?

A. No.

Q. Where was that?

A. In the Hungerford Hotel.

Q. Well, Mr. Rowland was there?

A. Yes, sir.

Q. And wasn't the Lytle and Green matter mentioned at that meeting?

A. We had met Mr. Northrup to discuss the Okes Construction Company.

Q. Was the Okes Construction Company policy then issued?

A. I don't recall that. I was in the Seattle office and the policy was issued in the Tacoma office.

Q. Why did you call upon Mr. Northrup to discuss the Okes Construction policy?

A. It was in the process of being written, I believe, at that time, and Mr. Northrup had the governmental supervision of that policy, was our estimation.

Q. The Okes Construction policy was a comprehensive policy on another cost plus contract with the government, is that right?

A. What was your question again?

Q. I say, you knew that the policy issued on

(Testimony of L. C. Miller.)

Okes Construction Company was a comprehensive—no, strike that. It was a comprehensive employees' compensation coverage policy?

A. The contract was being discussed at that time, and the contract was a——

Q. And the contract was a cost plus fixed fee contract, as Lytle and Green? [213]

A. That was my understanding.

Q. You knew and recognized Mr. Northrup was the government agent in charge of the supervision of this contract? A. Yes.

Q. Did you meet Mr. Northrup thereafter?

Mr. Peterson: I do not think all of this is cross-examination, but it certainly don't have anything to do with what I had inquired of.

The Court: You may answer.

A. I had dinner with Mr. Northrup one night after that, I believe.

Q. Did you discuss the Lytle and Green matter then?

A. No, it was more or less of a social meeting, is all I recall.

Q. You knew of the government's interest in this insurance contract, did you not? A. Yes.

Q. You knew that it was subject to the approval of the Public Roads Administration, or the government agency? A. That is right.

Mr. Sager: I think that is all.

Redirect Examination

By Mr. Peterson:

Q. Did you ever talk to Mr. Bright?

(Testimony of L. C. Miller.)

A. I talked to Mr. Bright over the telephone only once.

Mr. Peterson: That is all.

(Witness excused.) [214]

The Court: Is there any contention here on the part of the plaintiff that the government did approve this insurance contract, or any contention on the part of the defendants that the government rejected or disapproved it?

There is no testimony either way as I recall.

Mr. Sager: The government's contention, that is one of the reasons why we showed this series of letters of course, from La Rocque to Northrup. It was never approved. They were negotiating throughout this period of time, trying to negotiate a settlement of the premium, but there never was an approval. I think it is important to call your Honor's attention to the fact that the policy was not actually issued until the end of July—July 30th, the first time these parties came in possession of the policy. The policy was not in existence for thirty days. As far as examining it or considering it while it was dated back to June 17th, they never knew what the policy was until some time after July 30th, when it was actually issued, and July 30th to August 31st, a period of one month they were negotiating—objecting, and all of this series of negotiations ensued thereafter.

Mr. Peterson: I do not want to argue the matter now, but the evidence shows that on June 12th, if

my memory serves me correctly, the binders were delivered to Mr. Bright, who is district engineer at Seattle, and the binder contains all of the provisions of the policy, with possibly a slight additional provision regarding the territory. [215]

We propose to introduce Mr. Rowland in the morning, who——

The Court: Well, I just wanted to get it fixed in my own mind.

Mr. Peterson: Well, we will show, I think, three copies of the policy were delivered to Mr. Bright on July 30th and no objection made to them. I think it was three copies—or at least one copy, anyway.

Mr. Sager: As a matter of fact, the original.

Mr. Peterson: Well, I think it is in evidence already, that the original was delivered, Your Honor, on July 30th. If Your Honor will recall those letters——

The Court: Yes, I recall those.

Well, we will take an adjournment now until 10.00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock a.m., September 8th, 1944.) [216]

September 8, 1944,

10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

Mr. Sager: I advised the Court that these interrogatories and other mattres that were required came this morning. There is a copy of the interrogatories, and here is a letter produced for inspection. I will file a copy of the interrogatories.

Mr. Peterson: If the Court pleases, we have in this case a deposition——

The Court: Is that the deposition of D. W. Clayton?

Mr. Peterson: Yes, Your Honor. I think I should state to the Court this deposition was taken——Mr. Clayton was expecting to leave the jurisdiction of the court daily, and so far as I know he has not left yet. He is within the jurisdiction of the Court. Is there any objection under the circumstances in offering the deposition?

Mr. Sager: No, we do not object to it on that ground.

Mr. Peterson: Would you like to take the stand and read the answers, and I will read the questions, and then you can make your objections. You don't have a copy, do you?

Mr. Sager: No, I don't have a copy.

The Court: The original deposition is here, and [217] the record may show the Court directs publication of it.

Mr. Sager: There are, I think, Mr. Peterson, a couple of corrections of wording. I might call your

attention to them now, page 18, line 3, I think this should be "two".

Mr. Peterson: Your Honor, may we—the witness because of the situation, did not have a chance to read this deposition. We waived the signing of it, and obviously the word "true" on page 18, line 3, should be "two". May we——

The Court: Yes, if you both agree upon that.

Mr. Sager: Yes. Line 5 of page 24, the word "regrouped" should be "recruited".

The Court: What page?

Mr. Sager: Page 24.

The Court: And what line?

Mr. Sager: Line 5.

The Court: Oh, yes. Well, do you desire to read this deposition so as to get it into the record?

Mr. Peterson: Yes, Your Honor, it was under the stipulation taken subject to objections that could be raised at the time it is presented.

“United States District Court, Western District
of Washington, Southern Division”

No. 556

“HANSEN & ROWLAND, INC., a corporation,
Plaintiff,

vs.

[218]

“C. F. LYTLE COMPANY, INC., a corporation,
and GREEN CONSTRUCTION CO., a corporation,

Defendants.

“DEPOSITION OF D. W. CLAYTON

“Be It Remembered, That hertofore and on, to-wit: the 31st day of August, A.D., 1944, commencing at the hour of 10:30 o'clock a.m., the deposition of D. W. Clayton, a witness produced in behalf of the plaintiff herein, was taken before me, H. C. Walker, a Notary Public in and for the State of Washington, residing at Tacoma, pursuant to stipulation herein, at Suite 625, Dexter-Horton Building, Seattle, King County, Washington.

“The Plaintiff herein being represented by its attorney and counsel, Charles T. Peterson, Esq.,

“The Defendants herein being represented by their attorney and counsel, Harry Sager, Esq.,

“Whereupon the following proceedings were had and done and testimony taken as follows. to-wit:

“STIPULATION

“It is hereby stipulated and agreed between the plaintiff and defendants, by their respective coun-

sel, that the deposition of D. W. Clayton may be taken before H. C. Walker, Notary Public in and for the State of Washington, residing at Tacoma, on oral interrogatories commencing at the hour of 10:30 o'clock a.m., on the 31st day of August, A. D. 1944, at Suite 625, Dexter-Horton Building, Seattle, Washington; and it is further [219] stipulated and agreed that any and all objections, except objections to the form of questions propounded, may be raised and passed upon at the time of trial.

“D. W. CLAYTON,

a witness produced in behalf of the Plaintiff herein, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

“Direct Examination

“By Mr. Peterson:

“Q. State your name, please?

“A. D. W. Clayton.

“Q. Where do you reside, Mr. Clayton?

“A. Sioux City, Iowa.

“Q. Mr. Clayton, are you acquainted with the defendants, C. F. Lytle Company, incorporated, a corporation; and Green Construction Company, a corporation?

A. Yes, sir.

“Q. State whether or not you are associated with either of those companies?

“A. I am associated with both of them.

“Q. In what capacity?

“A. As office manager and office engineer, and in 1942 I was employed by the joint venture of

(Deposition of D. W. Clayton.)

Lytle and Green on the Alaska Highway as Assistant Project Manager.

“Q. Mr. Clayton, the primary contract appears to have been entered into on or about the 4th of May, 1942; I will ask you when the corporations of Lytle and Company and Green and Company became active in making preparations for the performance of this contract?

“A. Well, the negotiations were carried on during the month [220] of April, 1942, the latter part of the month, and approximately the date of the contract.

“Q. As office manager and engineer, did you participate in those negotiations?

“A. To an extent; I had charge of the development or assisted in the development of the organizations to do the construction work.

“Q. What had been the business of Lytle and Company during the period you were there prior to and at the time of making this contract?

“A. You mean on this joint venture?

“Q. No, in their past business?

“A. Lytle and Company for a number of years had been highway contractors, particularly grading and bridge work.

“Q. Operating in what area generally in the country?

“A. In Iowa, Missouri and Nebraska; I probably could say in the middle west and in Alaska.

“Q. How long had you been acquainted with Green Construction Company and its operations?

(Deposition of D. W. Clayton.)

“A. Ten to fifteen years.

“Q. What generally was its business?

“A. They are grading contractors.

“Q. As contracting outfits go, were they regarded as small or large operators?

“A. I would say medium.

“Q. Now, after the contract was made with the Federal Works Administrator on this Alaska Highway, what did the defendant companies proceed to do with respect to making preparations for the carrying out of the work? [221]

“A. Subject to the approval of the Public Roads Administration, they arranged for a number of unit contractors to take their organizations and equipment to Alaska and perform the actual construction operations on the highway.

“Q. Now, when did you become acquainted with these various other, I will call them sub-contractors?

“A. Excuse me, I think the better word is unit contractors.

“Q. Very well, I will call them unit contractors in accordance with your suggestion; did you become acquainted with those various unit contractors? A. Yes, sir.

“Q. What was the business of those generally?

“A. Some of them, the greater number were grading contractors and then there was a smaller number of what we call bridge contractors.

“Q. Were all of these individuals, partnerships or corporations, unit contractors, I will ask you

(Deposition of D. W. Clayton.)

whether or not they were all, prior to 1942, engaged in the general contracting business on a larger or smaller scale? A. That is correct.

“Q. And there were some ten or twelve of those, were there not? A. Yes, sir.

“Q. It is not important to name them. What, if anything, did your organization do about recruiting labor?

“A. Well, for our own organization, we set up the administrative personnel to cover the management and direction of the work, including the records required by the [222] Public Roads Administration and arranged for supplies and transportation of this equipment that was furnished by the government agency.

“Q. Now, did the Lytle Company and Green Company or either, furnish any quantity of equipment of their own? A. No, sir.

“Q. How about the unit contractors, did they furnish any?

“A. The unit contractors furnished the major items of equipment.

“Q. And what did that generally consist of?

“A. For the grading contractors, tractors, scoops, bulldozers, trucks and repair parts.

“Q. Any shovels?

“A. Including shovels, track lines and cranes, including bridge builders' equipment, saws and tools.

“Q. All small tools? A. Yes, sir.

(Deposition of D. W. Clayton.)

“Q. About where was that equipment assembled and shipped from?

“A. From Iowa and neighboring states in the middle west.

“Q. Without detailing the number of units I wonder if you could tell us right offhand how many were shipped by train?

“A. All of the equipment was assembled at the station nearest its location at that time and shipped by rail, most of it up to Prince Rupert and some to Seattle and thence by boat to Valdez.

“Q. Can you tell us generally how many carloads of equipment were shipped? [223]

“A. My estimate would be about one hundred carloads.

“Q. What, if anything, was done about recruiting common labor, truck drivers and equipment operators?

“A. In this arrangement to have unit contractors perform the actual construction operations, each one of the unit contractors employed their own organization supervisory force, laborers, truck drivers, and other workers, skilled and semi-skilled. The Lytle and Green organization employed the administrative and general supervisory forces of the managing contractor.

“Q. State who selected the individual workmen and made the arrangements in respect to their pay and transportation to go on the job?

“A. Lytle and Green selected the management contractors' organization and each one of the unit

(Deposition of D. W. Clayton.)

contractors selected their own working personnel, subject, of course, to the approval of the Public Roads Administration.

“Q. And about when did operations begin on the construction in Alaska?

“A. About July 1st, 1942; I would say about July 1st.

“Q. And the assembling of this equipment, loading and arranging for its transportation and all of those things, when did that begin?

“A. In the latter part of May; about May 20th, 1942.

“Q. When did you go to Alaska?

“A. In 1942, I went there on September 1st.

“Q. And what was your position up there?

“A. In 1942? [224]

“Q. Yes.

“A. My time in 1942 was spent mostly in Seattle in arranging for supplies and the procurement and shipment of supplies to the project.

“Q. Now, after you got on the job up there, I will ask you whether or not these various unit contractors were assigned to different units?

“A. Different sections.

“Q. Different sections of the work?

“A. Yes, sir.

“Q. And who made those assignments?

“A. The managing contractor, Lytle and Green.

“Q. Now, in carrying on the work up there, that is the actual performance of it, who gave the orders

(Deposition of D. W. Clayton.)

and directions generally to the workmen as to the method, manner and means of doing the work?

“A. The unit contractors.

“Q. What representatives did the Public Roads Administration or the Federal Works Administration have on the job?

“A. Do you want the name of the person?

“Q. No, just the representatives.

“A. Oh, they had a resident engineering and auditing division, a complete engineering organization including field engineers.

“Q. Now, what did the resident engineers and field engineers do?

“A. They prepared the plans and outlined the scope of the operation.

“Q. Did they give any orders or directions to the indiv- [225] idual workmen on the job as to the manner, method and means of doing the work?

“A. No, sir.

“Q. I will ask you whether or not the general or project managers, that is what Lytle and Green were termed, I will ask you whether the project manager provided the method, manner and means of transportation of supplies and equipment and personnel and about the many other things probably that were necessary in the performance of this work? A. Yes, sir.

“Q. And who selected the equipment for that?

“A. I did not quite follow you.

“Q. I say, who selected the equipment as between the government engineers or the project man-

(Deposition of D. W. Clayton.)

agers? What equipment did you use up there in the way of transportation?

“A. On the project?

“Q. Yes, on the project? A. Trucks.

“Q. And who furnished those?

“A. The Public Roads Administration.

“Q. And who directed their operations?

“A. You may also supplement that answer, the Public Roads Administration furnished the major items of trucking equipment but each individual contractor did furnish a few of their own private trucks and automobiles.

“Q. And who directed the movement of those transportation vehicles, trucks and automobiles, and so forth? [226]

“A. J. Leo Hoak; I can't recall whether he operated under Hoak Construction Company or Leo Hoak; he was one of the unit contractors.

“Q. He was one of the unit contractors?

“A. Yes, sir.

“Q. I will ask you whether or not he was under the direction of the project manager?

“A. Yes, sir.

“Q. Just what did the project managers do, what were the functions they exercised generally with respect to the job?

“A. The managing contractor?

“Q. Yes, the managing contractor, that is the project manager?

“A. Subject to the instructions and directions of the Public Roads Administration, they directed

(Deposition of D. W. Clayton.)

all of the construction activities of the unit contractor and furnished and provided and arranged for transportation of supplies to the project and the procurement of supplies and units of equipment required for special operation and provided housing facilities for all of the workmen, including the unit contractors' organization, and also kept the records as directed by the Public Roads Administration.

"Q. Who selected and hired the personnel to carry on the details of that work?

"A. They were selected by the Lytle and Green organization, managing contractors, subject to the approval of the Public Roads Administration. I do not want to repeat [227] too much here, but I do think it is important that we recognize that the Public Roads Administration were the directing agency.

"Q. Well, when you say they were the directing agency, do you mean generally? A. Yes, sir.

"Q. Did they give the men, individuals and drivers and so on, on the job, any orders?

"A. Oh, no.

"Q. When they wanted something done, how was the matter approached?

"A. The resident engineer would give the instructions, written usually, to the project manager who would then delegate the work to the unit contractor organization.

"Q. Now, with respect to discharging men on the job there, who did that?

(Deposition of D. W. Clayton.)

“A. Their terminations were arranged by the unit contractors and the project manager.

“Q. Mr. Clayton, I will ask you whether or not under the contract a schedule of wages was provided which was to be paid on the job? A. Yes, sir.

“Q. Do you know of any instances where there were departures from that schedule?

“A. No, sir.

“Q. When repairs to trucks and track lines and other equipment was deemed necessary, who determined that?

“A. The unit contractors determined that; the operators of the vehicle. [228]

“Q. Did the district engineer of the government attempt to supervise any details of the work, I mean the smaller details in carrying it out?

“A. No, sir.

“Q. I do not want to lead you, but if he wanted some particular thing done, like a bridge for instance, we will say, I will ask you whether or not he told you generally what he wanted, a bridge constructed, and then let the details of it to the unit contractor?

“A. Yes; of course, the government agency had inspectors to see that those instructions were carried out and to approve the completed work.

“Q. I will ask you whether or not that inspection and approval was carried on any differently than any other private contractor?

A. No, sir.

(Deposition of D. W. Clayton.)

“Q. Mr. Clayton, at the same time in the arrangement for employing workmen to go up there, I believe they were required, the workmen were required to sign Civil Service blanks or something, is that the fact? A. Yes, sir.

“Q. Will you state how that came about, if you know?

“A. Well, there were a number of conditions of the contract and one of the conditions of the contract provided that the Public Roads Administration would pay the individual employees by government warrant for their services and at that time it developed that unless they were recognized as Civil Service employees they would not be eligible to receive government pay direct, so they were placed on temporary Civil [229] Service enrollment.

“Q. And they paid those workmen and others when?

“A. Generally from the time of departure from their point of hire.

“Q. For instance, if you had twenty-five truck drivers assembled at Sioux City, Iowa, to ship to this job, when would their pay start?

“A. From the hour of the departure of the train from Sioux City.

“Q. How often were they paid?

“A. Semi-monthly.

“Q. Twice a month? A. Yes, sir.

“Q. I understand you to say those arrangements of having them designated Civil Service employees was temporary only? A. Yes, sir.

(Deposition of D. W. Clayton.)

"Q. And after they got on the job and got to going up there, was that abandoned, I am talking about the workmen, after the workmen got up on the job there? A. No, sir.

"Q. In answering that question do I understand you to mean that so far as the giving of orders was concerned and obeying orders and carrying out all of the details of the work and method of it, there was no difference after Civil Service was abandoned than before? A. No, sir.

"Q. Now, when men were through up there, completed their [230] work and were ready to depart and leave Alaska to go back or ready to leave Alaska, who arranged for their transportation?

"A. The management contractors.

"Q. How were they transported from the site, from the place where they were when they were through, to rail transportation, we will say?

"A. Well, we used all of the available means of transportation; some of them returned by truck from the project through Valdez and thence by water transportation to Seattle, and thence by rail to their point of hire. Some of them came out directly from the nearby airports.

"Q. When this truck and automobile agency was employed, who selected the trucks and drivers and gave them the directions?

"A. The unit contractor, Hoak.

"Q. I will ask you whether or not Mr. Hoak was under the general direction of the general project manager? A. He was.

(Deposition of D. W. Clayton.)

“Cross Examination

“By Mr. Sager:

“Q. When did you come out to Seattle, Mr. Clayton, in 1942 in connection with this Alaska project?

“A. I arrived in the latter part of May.

“Q. And then you were in Seattle until September? A. Yes, sir. [231]

“Q. And then went up to Alaska on the job?

“A. Yes, sir.

“Q. Were you in the Sioux City offices prior to May? A. Yes, sir.

“Q. Were they then the project manager, of these defendant companies, were they then preparing or getting ready to perform this contract?

“A. Yes, sir.

“Q. Were they recruiting labor at that time?

“A. Yes, sir.

“Q. And that is, around Sioux City, Iowa?

“A. Yes, sir.

“Q. When were these men placed under Civil Service?

“A. Prior to their departure from the point of hire.

“Q. They were put under Civil Service at the same time or in conjunction with their employment, with their hiring out? A. Yes, sir.

“Q. And who looked after the mechanics, that is, the filling out of forms and that sort of thing, necessary to place them under Civil Service?

(Deposition of D. W. Clayton.)

“A. The Lytle and Green organization, with the assistance of the Public Roads Administration.

“Q. By the way, were you put under Civil Service?

“A. No, sir, not the first year.

“Q. Were you at any time? A. No.

“Q. Were any of the Lytle and Green organization put under Civil Service? [232]

“A. All of them except O. W. Crowley and myself.

“Q. Who was O. W. Crowley?

“A. He was project manager.

“Q. You were the assistant manager?

“A. Yes, sir.

“Q. All of the rest of the Lytle and Green organization were Civil Service appointees except you two? A. Yes, sir.

“Q. Now, what about the unit contractors and their personnel, were they all placed under Civil Service?

“A. All except one representative of each unit organization.

“Q. And of course, every one who was a Civil Service appointee was paid by a government check, is that right? A. That is correct.

“Q. So I take it that the foremen or superintendents, or whatever their titles were who were actually on the job directing the work, the individual details of the work, were Civil Service appointees? A. Yes, sir.

(Deposition of D. W. Clayton.)

“Q. Am I right in assuming that of all of the men on the job in Alaska under this contract and unit contractors, there were not to exceed fifteen, approximately, who were not Civil Service appointees? A. That is right.

“Q. That would be two in the management organization and one in each of the organizations?

“A. Yes, sir. [233]

“Q. And they were under Civil Service from some time prior to their departure from Iowa?

“A. Yes, sir.

“Q. Until some time after 1942?

“A. Yes, sir.

“Q. When a person was discharged from his employment, was that discharge subject to Civil Service approval?

“A. Subject to the approval—I am not familiar about the Civil Service arrangement, but it was subject to the approval of the resident engineer.

“Q. That is the government engineer?

“A. Yes, sir.

“Q. The resident engineer? A. Yes, sir.

“Q. Now, you stated I think that there were no departures from the schedule of wages specified in the contract; were there occasions where a particular employee may be advanced in his position so that his individual wage would be increased?

“A. Reclassified.

“Q. Reclassified? A. Yes, sir.

“Q. Were those changes or reclassifications sub-

(Deposition of D. W. Clayton.)

ject to the approval of the Civil Service, or were they under Civil Service regulations?

“A. Yes, sir.

“Q. Do you know whether or not in 1942 there were any employees on this project, either of the project manager or the unit contractors, who were injured [234] while on the job? A. Yes.

“Q. Do you know whether or not they were compensated under the provisions of the Federal Compensation Acts? A. Yes, sir.

“Q. And were paid through the Federal Compensation Commission? A. Yes, sir.

“Q. What, generally, was the contract of this Mr. Hoak, contractor, or whatever it was, did he have some particular duty?

“A. He had charge of all of the transportation of supplies and materials.

“Q. He was not engaged in construction?

“A. No.

“Mr. Sager: That is all.

“Redirect Examination

“By Mr. Peterson:

“Q. Who selected the Hoak Company?

“A. The project manager.

“Q. Now, Mr. Clayton, an oiler or shovel runner, that called for a different scale of wages, did it not? A. Yes, sir.

“Q. Now, just what did the project manager do when he wanted to advance a certain employee's wages by reclassification, as you called it?

(Deposition of D. W. Clayton.)

“A. The unit contractor would recommend, make an application and recommend that the employee be reclassified [235] at the higher scale and rate and then the management director prepared the reclassification and took it to the resident engineer for approval.

“Q. And got his okeh on it? A. Yes, sir.

“Q. And that proposition, was that handled any differently after Civil Service was abandoned?

“A. No, sir.

“Q. It was the same all of the way through?

“A. Yes, sir.

“Q. And that was because the government was paying the bills?”

Mr. Sager: There is an objection to that question and Mr. Peterson agreed to strike it.

Mr. Peterson: That is right. “Yes, strike it out.”

“Q. Now, I will ask you whether or not there were cases where the project manager made expenditures and received reimbursements from the government? A. Yes, sir.

“Q. Was that in many instances?

“A. No, sir, that was only in cases of expediency and he could make procurement more readily than through government channels and with the prior approval of the resident engineer.

“Q. Now, when was this Civil Service arrangement abandoned?

“A. About the first of February, 1943.

“Q. Where was this arrangement made?

(Deposition of D. W. Clayton.)

"A. In Washington.

"Q. You were present, were you? [236]

"A. I was present at the preliminary discussion but I was in Edmonton when that occurred.

"Q. I will ask you whether or not the Public Roads Administration requested that the Civil Service arrangement or proposition be abandoned?

"A. Yes, sir.

"Mr. Sager: Wait a minute. He is probably testifying as to hearsay there.

"A. No, that was not hearsay because I was in the discussion at Washington, D. C.

"Q. I will ask you whether or not you discussed the matter with the representative of the Public Roads Administration or officers?

"A. Yes, sir.

"Q. With whom did you discuss it first?

"A. Mr. Helmintoller.

"Q. And what was his position?

"A. I don't know his exact title, but he was chief accountant and finance officer of the Public Roads Administration.

"Q. And anybody else? A. Mr. Bright.

"Q. What was Mr. Bright's position?

"A. He was the district engineer.

"Q. Where did you have that discussion at?

"A. Washington, D. C. at the Public Roads Administration office.

"Q. I will ask you whether or not you ever discussed it in Edmonton, Canada, before you went to Washington? [237]

(Deposition of D. W. Clayton.)

“A. No, sir, that was subsequent.

“Q. How long following that was this plan of having these men sign Civil Service blanks abandoned?

“A. Immediately.

“Q. Now, I will ask you whether or not the government continued to pay checks direct to the men until the completion of the job?

“A. Yes, sir.

“Q. In hiring these men you wanted to hire, say, a shovel runner in Sioux City, Iowa, when he started this job was he required under the Civil Service proposition to take any examination?

“A. A physical examination and a questionnaire as to his experience.

“Q. I will ask you whether or not that was required of all the employees?

“A. All employees.

“Q. Was there any instances that you know of where a unit contractor or project manager selected an employee who was rejected by the government?

“A. No, sir.

“Mr. Sager: Q. This physical examination and questionnaire examination was made pursuant to the requirements of the Civil Service regulations?

“A. Yes, sir.

Mr. Sager: There is an objection, however.

“Mr. Peterson: I object to that as calling for a conclusion of the witness.

“Mr. Sager: Well, then, I will ask the question

(Deposition of D. W. Clayton.)

this way, the physical examination and the [238] information required in the questionnaire was not a requirement of the unit or project managing contractors? A. No.

“Q. It was required by the Civil Service?

“A. Yes, sir.

“Mr. Sager: That is all.

“Mr. Peterson: Q. Was there any exception in this Civil Service matter until the project manager requested the government to pay the employees direct? A. No, sir.

“Mr. Sager: Q. Well, of course, the request to pay direct went through before any personnel were recruited, did it not? A. Yes, sir.

“Mr. Sager: That is all.

“Mr. Peterson: Mr. Sager, are you agreeable to waiving the signature and the reading of the deposition by the witness?

“Mr. Sager: Yes, I will so stipulate.”

Mr. Conley: Witness excused.

Mr. Peterson: We ask that the original be filed.

The Court: It may be filed.

Mr. Sager: I would like to make those corrections in the original.

The Court: Yes. [239]

Mr. Peterson: Mr. Rowland, will you take the stand, please.

I. C. ROWLAND,

recalled as a witness on behalf of the Plaintiff, was examined further and testified in rebuttal as follows:

Direct Examination

By Mr. Peterson:

Mr. Peterson: Mr. Rowland, you have been sworn. I am not sure whether in your redirect examination the other day I covered this matter of the meeting you had with Mr. Scadden, leading up to the cancellation.

A. I can't hear you.

Mr. Peterson: I am not sure I covered—never mind, I will go ahead and ask the question.

Q. Mr. Rowland, there has been reference to the Okes Construction Company contract in this case by Mr. Northrup. What portion of this Alaska Highway did the Okes Construction Company cover?

A. From I believe Fort St. John to Fort Nelson.

Q. Fort St. John, British Columbia, to——

A. Fort Nelson, British Columbia.

Q. That is a distance of how many miles? [240]

A. I think——

Q. Approximately.

A. Approximately, I think 250 miles.

Q. Yes, and did you or your company, or your agency, have any insurance coverage with respect to that job? A. Yes, we did.

Q. And what was the nature of that coverage?

A. Compensation insurance on employees en-

(Testimony of I. C. Rowland.)

gaged in performing the work for the Okes Construction Company, and their associated and affiliated and associated contractors.

Q. Workmen's Compensation was compensation for injuries and loss of time when workmen were injured, as the result of any casualty?

A. In the performance of his work.

Q. Medical expense as well?

A. No, our policy did not provide we should pay the medical. The medical I believe was provided by the Public Health Service.

Q. Beg your pardon?

A. The medical, I believe, was provided by the Public Health Service.

Q. And along about the first of August, did any controversy arise with reference to that Okes Construction Company job?

A. Yes, a little later than that.

Q. When did it?

A. Along about August the 10th.

Q. Yes, and how did that come about, Mr. Rowland?

Mr. Sager: Oh, I think that is immaterial, [241] Your Honor.

Mr. Peterson: I think I will connect it up and show——

The Court: Objection will be overruled.

A. About that time our claims representative, who we had sent to Fort St. John, advised us that the British Columbia Compensation——

Mr. Sager: Just a moment, I object to that.

(Testimony of I. C. Rowland.)

The Court: Yes, I think so.

Q. They were working under your directions, your claims department? A. Yes, he was.

Q. Yes, and in the course of their employment, they had advised you what?

Mr. Sager: Well, I object to that.

Mr. Peterson: I think he was—we have a right to show what an employee acting under his——

The Court: Well, it is awfully close to the hearsay rule.

Mr. Peterson: Not what he said, but just the facts.

Mr. Sager: It is hearsay evidence.

The Court: I think I shall let him answer.

Q. Don't tell what he said, but what he advised you of.

A. He advised that the British Columbia Compensation Board was interfering with the loss of settlements and payments to these injured workmen.

Mr. Sager: I object to that, it is purely hearsay, no possible way of cross-examining whether the British Columbia Board was ever doing—— [242]

The Court: Well, the substance of it was that there was some difficulty arose with the British Columbia Board and that caused the discussion on the Okes contract. The Court is admitting this only because these two controversies apparently have become interwoven, in these contracts by the testimony that has gone in, but I do not mean of course to throw down the bars and let all conversations of

(Testimony of I. C. Rowland.)

that kind or history of the Okes contract become a part of this.

Mr. Peterson: I don't want to do that.

Q. Under your coverage of the Okes Construction Company, how was that written, under what plan?

A. It was insurance policy agreeing to pay federal harbor workers and longshoremen benefits, to these injured workmen, excluding medical attention.

Q. You refer to the federal workers——

A. Federal harbor workers.

Q. And Longshoremen's Act of the United States? A. That is right.

Q. What if anything did the Canadian authorities do with respect to taking jurisdiction of the injured workmen and their claims?

A. Well, they never, during our time on the risk, absolutely took possession of the claims, because on about August the 20th I went to Vancouver and called on the British Columbia Compensation Board to inquire——

The Court: I think——

Mr. Sager: Just a moment, I am going to object to all this controversy.

The Court: We are not trying the Okes contract. [243] The fact there was a controversy arose that led to some discussion with the federal authorities and involved itself with the policy and the compensation or the payments of it here in question——

Q. State just what the controversy involved, just briefly.

(Testimony of I. C. Rowland.)

A. It related to whether the order in council had been issued by the Dominion Government, setting aside the British Columbia Compensation Act, whether they had the jurisdiction over the Okes Construction Company employees or not.

Q. Had it been set aside, what would have been the scheme of insurance?

Mr. Sager: I am objecting to all this line of conversation.

The Court: You may answer.

A. If the order in council had been issued?

Q. Yes.

A. Then the Federal Harbor Workers' Compensation Act would have applied and the benefits would have been properly payable under that.

Q. I will ask you whether the contract of the Okes Construction Company was written on the representation that such an order in council had been made? A. It was.

Q. And did you ascertain after the coverage had been made whether or not an order in council had been made? A. It had been represented——

The Court: I don't see the materiality of this, Mr. Peterson. I do not see how it ties in with the issues. [244]

Mr. Peterson: I am going to tie it in with Mr. Northrup's activities.

The Court: That matter may still be a matter in dispute in the administrative agency of the government whether we can or cannot pay it, we cannot make or destroy that case.

(Testimony of I. C. Rowland.)

Mr. Peterson: I realize that. It simply leads up—it is a preliminary matter. As a matter of fact, it is preliminary, leading up to this discussion with Mr. Scaddon.

The Court: I think you have covered it sufficiently preliminary to show——

Mr. Peterson: Very well.

Q. Now, I will ask you whether or not you had a conference with Mr.—well, what did you do with respect to the British Columbia coverage or the Okes Construction Company coverage?

A. Immediately on my return, I served a notice of cancellation.

Q. On the contractor?

A. On each of the contractors, terminating the coverage as provided by policy provisions.

Q. When was that notice of cancellation served?

A. Along the latter part of August in 1942.

Q. I will ask you whether or not following that you were contacted by any of these representatives of Mr. Northrup's department of the government?

A. Mr. Northrup called me on the telephone, and Mr. Scaddon—Mr. Northrup was in Washington and Mr. Scaddon was in San Francisco, and he called me from San Francisco [245] requesting I withdraw the cancellation notice.

Q. And did you thereafter have a meeting with Mr. Scaddon? A. Yes, sir, I did.

Q. Where? A. In Tacoma, here.

Q. And about when was that meeting held?

(Testimony of I. C. Rowland.)

A. I can't give you the exact date, but some time in the latter part of August or early September.

Q. August, 1942? A. Yes.

Q. And was there anything said during that discussion about the Lytle-Green insurance?

A. Yes.

Q. Just state what occurred in that connection?

A. Mr. Scaddon told me that if I did not withdraw the cancellation notice on the Okes Construction Company, that he would cancel the policy of the Lytle and Green Company on the Slana job.

Q. What did you say to Mr. Scaddon?

A. I told him he had no authority to give me any notice of cancellation on Lytle and Green, and I would not accept any from him. It would have to come from the assured.

Q. And the assured were?

A. Were Lytle and Green, and the associated contractors.

Q. And then, in pursuance of that, you received the—did you thereafter receive cancellation notice from the assured?

A. Yes, we received the requested cancellation from Lytle and Green. [246]

Q. Prior to that time, had there been any objection of any kind made to you by anybody with respect to this binder you had issued?

A. No, sir.

Q. On the 17th of June, I think it was 1942?

A. On Lytle and Green?

(Testimony of I. C. Rowland.)

Q. Yes. A. No.

Q. By anybody? A. No.

Q. P.R.A. or anybody else? A. No.

Q. Had there been any objections of any kind, or requests for modifications or that changes be made with respect to the binder, or the policy which was issued, I think you testified on July 30th, 1942, prior to the cancellation?

A. Prior to this period when——

Q. Yes. A. No.

Mr. Peterson: Cross-examine.

Cross Examination

By Mr. Sager:

Q. Didn't you discuss this Lytle and Green coverage in Washington when you were back there with and saw Mr. Northrup?

A. Only telling him we had the coverage on.

Q. Didn't he at that time tell you that the premium was all out of line, they would not pay it? [247]

A. No, not on Lytle and Green. The discussions in Washington were centered all on Okes Construction Company.

Q. Didn't he tell you——

Mr. Peterson: Let's fix the time of that conversation in Washington, please.

Q. Well, it was about ten days after the latter part of June, is that correct, Mr.——

A. I couldn't——

Q. You testified about it the other day.

A. Whatever I testified was the date. I can't tell you, I can't remember.

(Testimony of I. C. Rowland.)

Q. It was——

A. Some time along in there.

Q. It was on your trip back there which you made, I assume, directly after seeing Mr. Northrup, is that right? Your first meeting with Mr. Northrup in Seattle was at your request, is that true?

A. I don't know whether or not I talked with him—I know I told the boys to arrange a meeting. I don't know whether I did it or who did it.

Q. You called upon him in Seattle to discuss these two coverages, the Okes and the Lytle and Green, which you were about to put into effect?

A. No, I called on him to discuss the Okes Construction Company, the compensation risk. This had already been completed. We bid on the Lytle and Green business. We were invited to bid, and we submitted our proposal and we had already been awarded the business.

On the Okes Construction Company it was an entirely different situation. There had been no agreement. [248] There had been no arrangement as for rates or whether or not we were going to write the premiums on—and at that time the contractors for Okes Construction Company were moving large amounts of equipment, and some controversy arose in St. Paul because this equipment was not insured, and the banks objected to it going into Canada, with the result that the Okes Construction Company telephoned us to fix some all risk contractors' equipment insurance, and we attached the risk.

(Testimony of I. C. Rowland.)

Q. Now, that Okes contract coverage was another cost plus contract, or the same as Lytle and Green?

A. Well, I have never seen their contract, but I understand it is a cost plus contract.

Q. And your contract with them did not name the government as an assured, did it?

A. No, it did not.

Q. Why were you talking to Mr. Northrup about either of these contracts?

A. Because Mr. Okes had told me that either Mr. Northrup had been in St. Paul, or there had been a contract somewhere—I don't know where, and Okes asked me to discuss the subject with Northrup.

Q. You knew who Mr. Northrup was?

A. I did not know until I met him here in Seattle. I had never met the gentleman before.

Q. Well, did you know who he was with, or who he represented?

A. I knew he was with the P. R. A.

Q. And in charge of their insurance matters?

A. He represented that to me, to be a fact.

Q. Didn't Mr. Okes represent that to you? [249]

A. Mr. Okes said he was with the P.R.A.

Q. And you would have to talk with him about the insurance?

A. To discuss the matter, the insurance, with Mr. Northrup.

Q. Well, he told you that Mr. Northrup had something to do with the approval of it, didn't he?

(Testimony of I. C. Rowland.)

A. I testified he asked me to see Mr. Northrup.

Q. Why were you seeing Mr. Northrup if he did not have anything to do with this insurance?

Mr. Peterson: Your Honor, the contracts provide here, with the approval of the district engineer, the insurance——

Mr. Sager: Or his representative.

The Court: Objection will be overruled. You may answer.

A. My client was the Okes Construction.

Q. Why were you talking to Mr. Northrup, then?

A. Well, will you let me answer the question or not?

My client was the Okes Construction Company and they directed that I see Mr. Northrup for the purpose of discussing the form and type of coverage that we were going to attach, and also to discuss with him this contractors' equipment policy.

Q. Well, did you understand that Mr. Northrup was representing Okes?

A. No, I just testified he was with the P.R.A.

Q. And when you went back to Washington and called on Mr. Northrup in Washington to discuss these contracts or either of them, why did you do that?

A. Because Mr. Northrup when he was in Seattle, asked that when I was in Washington that I do call on him relative [250] to these contracts and we would at that time endeavor to work out a plan of operation, and a plan of writing the business.

(Testimony of I. C. Rowland.)

Q. Well, you recognized then that he had something to do or say about these contracts?

A. Yes, that is true.

Q. And you were seeking his approval?

A. No, I was not.

Q. Well, you were submitting your plans and policies to him?

A. I was discussing—we hadn't any policies drawn at that time.

Q. Well, you had a binder?

A. We had a binder at that time.

Q. You sent him a copy of it?

A. I think we did, yes.

Q. And in that meeting in September, the first part of September in Mr. Bright's office in Seattle, where both Mr. Scaddon and Mr. Northrup were present——

Mr. Peterson: That is objected to as not cross-examination.

The Court: Objection will be overruled.

Mr. Peterson: Exception.

Q. You were discussing both of these policies at that time with Mr. Northrup, and Mr. Scaddon?

A. Mr. Northrup and Mr. Scaddon were discussing them with me.

Q. Well, you were in their office, were you not?

A. Yes, at their invitation.

Q. And the Lytle and Green policy had then been cancelled? A. It had.

Q. When were you first notified to cancel the policy? [251] A. Which policy?

(Testimony of I. C. Rowland.)

Q. The Lytle and Green.

A. Well, I can't answer that. It would be some time after the 20th of August, 1942. The exact date, I can't fix from memory, because it followed my return from Vancouver, at the time I had received the cancellation on the Okes Construction Company.

Q. And who notified you?

A. You mean when the cancellation was finally effected?

Q. Who notified you to cancel the Lytle and Green? A. Lytle and Green.

Q. Well, what person?

A. Well, I don't know who signed the letter.

Q. Was your first information of that by letter, or did they notify you orally?

A. Lytle and Green?

Q. Yes.

A. Well, Mr. Scaddon was the one that threatened the cancellation orally, and when I told him I would not accept a notice of cancellation from him, then he turned around and said, "I will instruct the contractors," and I said, "I can't help it, if the contractor asks for a cancellation I will have to cancel it according to its provisions."

Q. Mr. Scaddon said he would instruct the contractors to cancel? A. Yes.

Q. When was that? A meeting here in Tacoma?

A. After I returned from Vancouver.

Q. That was a meeting here in Tacoma?

A. The same thing was reaffirmed in Seattle.

(Testimony of I. C. Rowland.)

Q. Your Seattle meeting was about the 1st or 2nd of September?

A. Along in there some time.

Q. So that your meeting with Scaddon was apparently some few days before that?

A. Yes, sir, it was between the 20th and the 1st. I don't know, Scaddon was first in San Francisco, and he called me from San Francisco, and then he was up here. He was in and out.

Q. Scaddon also was representing the government or some agency of the government?

A. Some agency of the government.

Q. With respect to insurance matters?

A. Yes, sir.

Q. On these contracts?

A. Well, I don't know what contracts.

Q. Well, you at least were talking to him about the insurance coverage on these contracts?

A. Started off on the Okes Construction Company contract.

Q. And immediately after Scaddon told you that he would instruct the contractor to cancel it, you were notified of its cancellation?

A. We received a telegram or letter, I don't know which, from the contractor.

Q. Didn't the contractor when he gave you the first notice of cancellation, advise you that he was cancelling it at the instance of the P.R.A.?

A. The letter would show that, I don't know what the letter says.

(Testimony of I. C. Rowland.)

Q. Has that letter been put in evidence? [253]

A. I don't know.

Mr. Peterson: The cancellations are all here in evidence.

Q. Well, you received actually these letters of cancellation, these formal letters of cancellation, you received some time later at your request?

A. Yes, sir, we got the notice of cancellation from Lytle and Green long prior, those were drawn up afterwards.

Q. Do you have that letter?

A. I haven't got it.

The Court: Long prior to what do you mean?

A. To these formal cancellations. You see, we had to get a cancellation from each one of these unit contractors, but Lytle and Green for the purpose of cancellation had the authority to request it. The policy recited they had the authority to request the cancellation.

The Court: I think we will take the morning intermission now of fifteen minutes, and you can check up and find the documents.

(Recess.)

Mr. Peterson: If I may, I would like to ask the witness another question or two.

Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, did you have any discussion with Mr. Rice as to providing for personnel to handle claims and [251] facilities in the vicinity of this work in Alaska?

(Testimony of I. C. Rowland.)

A. Yes, he wanted to know what facilities we had, and then I advised him what arrangements we had up there for the handling of our Alaska business.

Q. What did you tell him?

A. I told him we had representatives at different parts of Alaska that were prepared to handle these claims.

Q. Did you tell him who your representatives were?

A. I told him who we would assign to handle these claims, and we did make the assignments.

Q. Who did you tell him?

A. A man by the name of Hodge at Cordova, who is an attorney, and an attorney at Fairbanks, Alaska.

Q. And his name?

A. I think it was Klege.

Q. I will ask you whether or not in connection with that you furnished him with blank forms on which to report their claims?

A. We furnished Lytle and Green with a supply of forms to be distributed to the different unit contractors. We also supplied the claims' men with all the necessary forms for handling and investigating the claims.

Mr. Peterson: I think that is all.

Recross Examination

By Mr. Sager:

Q. By the way, Mr. Rowland, did you receive

(Testimony of I. C. Rowland.)

copies from Mr. La Rocque of the letters he was writing to Mr. Northrup?

A. I don't know, I don't know what letters you refer to. [255]

Q. I think most of them are incorporated in this exhibit.

A. I have some, but I can't tell you.

Q. As a general practice, where you acted as agent in a coverage of this sort, did the home office keep you advised of their correspondence?

A. Not generally, there is nothing in our arrangements that compels them——

Q. Would you then examine that exhibit and state whether or not he sent you copies of his letters in there?

Mr. Peterson: Are those the letters we agreed on over at my office? I think he examined them at that time and agreed they were copies he received.

A. These are the ones we checked over there against the files.

Mr. Sager: I do not want to mislead you, they are not all letters that you checked—all of the copies you checked, but there are some originals then from Mr. La Rocque, the original letters. Now, those you did not check.

Mr. Peterson: How many letters are there, there, Mr. Sager, if I may inquire?

Mr. Sager. There are probable ten or twelve.

Q. Now, Mr. Rowland, showing you Defendants' Exhibit A-13, and ask you if you have seen that before?

(Testimony of I. C. Rowland.)

A. It is a cancellation request for cancellation.

Q. That is the first notice of cancellation you obtained from the company, from Lytle and Green?

A. I don't know. There is another letter there—I don't know the date of it. That is addressed I notice to our Seattle office, the copy of it is. [256]

Q. No, this is addressed to the Tacoma office.

A. Is it?

Q. Yes.

A. Oh, yes, I notice there is a copy sent to our Seattle office.

Q. But that was the formal cancellation, isn't it, or notice of cancellation?

A. May I see the other letter? No, that is not the one.

Mr. Peterson: Let me see that letter, please, Mr. Rowland.

Oh, it is the one containing the copy of the telegram. A. What was the question, again?

Q. I think my last question was whether Defendants' Exhibit A-13 was the first notice of cancellation you received from Lytle and Green?

A. No, here is a letter dated September 2nd, from Lytle and Green, which was received in our Seattle office on September the 3rd, 1942, and was received at Tacoma on September the 4th, 1942.

Mr. Sager: I will offer them both, if you haven't any objection.

A. (Continuing): The other letter is dated September the 3rd, 1942, and was received in our Tacoma office on September the 5th, 1942.

(Testimony of I. C. Rowland.)

Q. The one you are referring to is Defendants' Exhibit——

A. The last one, Defendants' Exhibit A-13.

Q. The other one is not marked——

Mr. Sager: I will have that marked and offer them both. [257]

Mr. Peterson: No objection.

Mr. Sager: We offer Defendants' A-13 and A-14, Your Honor.

The Court: They will be admitted in evidence.

(Whereupon, letters referred to were then received in evidence and marked Defendants' Exhibits A-13 and A-14, respectively.)

DEFENDANTS' EXHIBIT No. A-13

C. F. Lytle Company and Green Construction Co.

Sioux City, Iowa [cut]

Offices: Slana, Alaska, Seattle, Washington,

Des Moines, Iowa, Sioux City, Iowa

September 3, 1942

Hansen & Rowland, Inc.,

Tacoma, Washington

Phoenix Indemnity Company

Policy CLP 1750

C. F. Lytle Company and

Green Construction Company

Gentlemen:

In accordance with instructions from the Public Roads Administration, you are requested to cancel as of September 1, 1942, the above captioned com-

(Testimony of I. C. Rowland.)

prehensive liability policy, covering C. F. Lytle Company and Green Construction Company and the construction contractors under the Lytle and Green Engineering-Management Contract.

We ask that you kindly acknowledge receipt of this notice to this office.

Your very truly,

C. F. LYTLE COMPANY and
GREEN CONSTRUCTION COMPANY

By H. L. RICE

(H. L. Rice)

Assistant Secretary

C. F. Lytle Company

HLR.amc

cc J. S. Bright, District Engineer, P.R.A., Hoge
Building, Seattle, Wash.

Seattle Office, C. F. Lytle Company and Green
Construction Co.

Gulkana Office, C. F. Lytle Company and Green
Construction Co.

[Endorsed]: Admitted Sept 8, 1944.

(Testimony of I. C. Rowland.)

DEFENDANTS' EXHIBIT No. A-14

C. F. Lytle Company and Green Construction Co.

Sioux City, Iowa

[cut]

Offices: Slana, Alaska, Seattle, Washington,

Des Moines, Iowa, Sioux City, Iowa

September 2, 1942

Air Mail

Hansen & Rowland, Inc.,

Dexter-Horton Bldg.,

Seattle, Washington.

Gentlemen:

We acknowledge receipt of your wire as follows:
Mr. Scadden Telephoned This Morning Stating He
Had Replaced Our Policy With Another Policy
Effective 12:01 AM September 1 Name Not Given
Stop We Advised Scadden Could Only Accept Can-
cellation From Named Assured Lytle and Green
And To Forward Request For Cancellation To Us.

The procedure that Mr. Scadden has taken is
hardly in accordance with the terms and intent of
our contract. We will be anxious to know, of
course, if the policy purchased gives our contractors
the same coverage as the one we now have and in
a company with claim facilities available to service
the contract. We will await advices and instructions

(Testimony of I. C. Rowland.)

from the Public Roads Administration, and govern ourselves accordingly.

Very truly yours,

H. L. RICE

H. L. Rice

HLR/hs

CC/Lytle & Green, 506 Smith Tower, Seattle,
Washington.

[Endorsed]: Admitted Sept. 8, 1944.

Q. Now, Mr. Rowland, did I understand that in the meeting with Mr. Northrup at Seattle the latter part of June, that—I don't want to mislead you, did you testify or did you say that the Lytle and Green policy or coverage was not discussed at that meeting?

A. No, I told Mr. Northrup that we had the policy at that time.

Q. I see.

A. He asked me if we had written any other business on these contracts.

Q. Now, showing you Defendants' Exhibit A-4, I will ask you to examine that and ask you if that is not a letter that you wrote within a day or so after that June meeting in Seattle?

A. Yes, this is a letter I wrote.

Q. Just immediately—practically after this June meeting with Mr. Northrup?

A. Yes, this is dated July the 30th.

(Testimony of I. C. Rowland.)

Q. Isn't that dated——

A. I beg your pardon, it is July 30th, 1942.

Mr. Sager: Let me see that. I am sorry, I gave you the wrong exhibit, Mr. Rowland, it is A-1,—Defendants' Exhibit A-1. [258]

A. And you asked—what was the question?

Q. Now, that is a copy of a letter you wrote to Mr. Northrup almost immediately after this June meeting?

A. On June 27th, 1942.

Q. And that just followed this meeting in Seattle with Mr. Northrup?

A. Yes, it did.

Q. Now, I want to call your attention to the paragraph—it is the fourth paragraph on the second page of that letter. Do you find that?

A. Yes: "We have also bound Underwriters at Lloyd's, London."

Q. You say, "We have also bound Underwriters at Lloyd's, London against all risk of loss and damage to contractors' equipment, supplies, stores, temporary structures, forms, etc., as more particularly set forth in the form left with you last night".

That insurance was directed cancelled by Mr. Northrup, was it not?

A. No, Mr. Northrup had nothing to do with that. If you will notice this letter, on the first page carried two captions.

Q. I appreciate that.

A. And that——

Q. Didn't Mr. Totten—Mr. Totten was one of your representatives?

A. He was.

Q. And didn't he take copies of that policy to Mr. Northrup, at Washington?

(Testimony of I. C. Rowland.)

A. Say that again. [259]

Q. Didn't he take a copy of that coverage mentioned in that paragraph to Mr. Northrup at Washington, or at Seattle?

A. Yes, Mr. Northrup asked to see that copy, but this all has to do with Okes Construction Company and not Lytle and Green.

Q. I am aware of it, and didn't Mr. Totten report to you that Mr. Northrup said they wouldn't have that coverage?

A. That coverage was terminated.

Q. As the result of that conversation between Northrup and Totten?

A. No, not as a result of that conversation.

Q. As a matter of fact, it was cancelled or terminated as of the day it was written?

A. We did that as an accommodation, because the contractor had difficulty in—with these other contractors, I don't know what the arrangement was, but our negotiations on that were entirely with the contractor at St. Paul.

Q. But, don't you—

A. Mr. Northrup didn't know this was written at the time we told him.

Q. It was cancelled by the contractor at the direction of Mr. Northrup?

A. No, I don't—I don't think Mr. Northrup—I don't know what the arrangements between Northrup and the contractor were. We had our—

Q. Well, didn't Mr. Totten report to you after this meeting with Mr. Northrup in Seattle, at which

(Testimony of I. C. Rowland.)

time he took these policies to Mr. Northrup, and Mr. Northrup said he wouldn't have them and didn't want that coverage? [260]

Mr. Peterson: Just a minute, Your Honor. In accordance with the Court's ruling in my direct examination, this is not proper cross-examination. We are starting to try out this Okes business.

The Court: Objection will be overruled, and I might state, Mr. Peterson, the Court is overruling it for the reason that I permitted you in your direct examination to show some animus on the part of the Public Roads officials in cancelling the contract here in question, growing out of some transaction had in connection with the Okes contract.

Mr. Peterson: I am afraid, Your Honor misconstrued my purpose.

The Court: Well, the witness testified he was warned if he proceeded with the cancellation of the Okes contract, this would be cancelled, and immediately following, there was a cancellation.

The Witness: If you will permit me to get my files on this Lloyd's cover, or to review my files, I could answer much more intelligently than to sit here and talk from memory on a coverage that was terminated in 1942.

Q. Well, do you have any recollection of Mr. Totten reporting back to you, after taking those policies to Mr. Northrup?

A. I don't recall it, no.

Q. Now, the Okes policy you cancelled——

A. Yes, we cancelled it.

(Testimony of I. C. Rowland.)

Q. Sometime along the latter part of August?

A. I think about that. I don't know the date.

[261]

Q. And no premium had been paid on that?

A. No.

Q. That was finally adjusted by your home office, and Mr. Northrup, so that the period you covered in that contract was placed under this plan that Mr. Northrup was discussing here the other day?

Mr. Peterson: That is not cross-examination, we object to going into that matter. It is not cross-examination, Your Honor.

The Court: What is the purpose of it, Mr. Sager?

Mr. Sager: Well, it is material to show that the insurance company recognized a negotiation of Mr. Northrup in connection with this Okes policy. As a matter of fact, at the same time they were negotiating with Lytle and Green.

The Court: I do not want to get too far afield.

Mr. Sager: I am not concerned with what the actual final adjustment was, I merely want to show there was an adjustment after a period of negotiation on the Okes contract.

The Court: That general question he may answer.

A. There never was any adjustment, because at the time the Okes Construction Company policy was written, there were no rates agreed upon, and there were no terms and conditions agreed upon, and

(Testimony of I. C. Rowland.)

we got off the risk by cancellation before any agreement had been reached as to rates or method of writing or form of writing, and all of the discussions as to rates and form, took place after the [262] cancellation.

Q. Wasn't the policy issued?

A. The policy was finally issued.

Q. Didn't it state a premium?

A. I can't recall whether there—I believe we issued a policy on some form.

Q. Well, as a matter of fact, didn't the policy specify a premium of \$21.00 per hundred?

Mr. Peterson: I would like to inquire when this policy was written. I think it is back in 1943.

A. This policy I think was written in 1942. This policy was written in 1943—I can't answer that.

Q. The policy was cancelled long before the end of August?

A. The risk was cancelled.

Q. So the policy had been issued prior to that time?

A. I couldn't answer the date the policy was issued without referring to the file.

Q. There was a policy issued?

A. There would have to be a policy issued.

Q. You would not issue it after it was cancelled?

A. Yes, that is done frequently. You write a binder, you can't stand on the binder.

Q. Now, to go back to my prior question, when-

(Testimony of I. C. Rowland.)

ever the policy was issued, didn't it specify a premium of \$21.00 a hundred?

Mr. Peterson: Object.

The Court: He can answer.

A. I wouldn't answer it without reviewing the policy.

Q. You don't have any recollection of it?

A. Not now, since 1942. [263]

Q. Do you have the policy here?

A. I think it is in the file.

Q. Would you mind checking it?

Mr. Peterson: Your Honor, it seems to me we are getting away——

The Court: I do not want to take a great deal of time on this matter. I think the Court could assume there was some charge made for premium in a policy that was issued, but I can't see the materiality, whether it was a large one or small one.

Mr. Sager: I don't think it is material except Mr. Rowland said there never was any premium fixed, and hence there was no adjustment. That is the only thing.

The Court: I think he answered along more or less technical grounds the definition of the term adjustment, but the whole matter is not of any high degree of relevancy in this issue.

Mr. Sager: The only relevancy that I think it has, is to show that they dealt and negotiated with Mr. Northrup on these policies.

Mr. Peterson: You don't have to show the

(Testimony of I. C. Rowland.)

premium rate and terms of the policies and those things.

Mr. Sager: I would not, if I had direct answers to my questions.

Mr. Peterson: I think you are going too far afield. That is not proper cross-examination.

The Court: He says he has the policy.

Mr. Peterson: If the premium rate is injected into this matter, and it is considered material, I will [264] have to go into the coverage. I don't want to do that.

The Court: The rate is not material, no. He may answer as to whether there was a premium rate, and what it was, but as to what the coverage——

Q. I will ask you if you have that policy, if it fixed a premium?

A. The policy was actually issued apparently on the 1st of September, 1942, and the policy itself carried endorsements certifying this policy has been cancelled as of 12:01 a.m., September 1st. required notice thereof having been furnished to all interested parties.

The Court: The question is, does it carry a premium?

A. It carries a whole whole schedule of rates. There is one, two, three, four, five, six, seven, eight, nine, ten, eleven—twenty-four.

Q. Do each of those rates have a fixed premium?

A. Yes, each of those rates have a fixed premium for that class of work.

(Testimony of I. C. Rowland.)

Q. For that particular coverage?

A. No, the policy is the coverage. This is the classification of the work that is being done on the project.

Q. All right. Now, then, isn't it a fact that some—many months later, back in 1943, that a final negotiation of that contract resulted in the paying of a premium much less than the premium—

Mr. Peterson: I object, Your Honor please.

The Court: I think I will sustain the objection.

Mr. Peterson: Not cross-examination. [265]

Mr. Sager: I take an exception. I think it is proper to show negotiations between these parties.

The Court: That you have shown, and the fact that controversy was adjusted on some particular basis is not material at all, here, Mr. Sager, unless you propose to show that they recognized the same source of payment in that policy that they did in this policy, and that they looked to the Bureau of Public Roads to pay their bill here, rather than to Lytle—or Lytle and Green.

Q. Do you know who paid that premium?

Mr. Peterson: Objected to as not cross-examination.

The Court: Objection overruled.

A. Okes Construction Company, they were the assured.

Q. Did the check come to you or did it go to the home office? A. That I don't know.

Q. Don't you know that it was paid direct by government check? A. I don't know that.

(Testimony of I. C. Rowland.)

Mr. Peterson: Object to that as not proper cross-examination.

The Court: Objection overruled.

A. I don't know how the checks were paid. I didn't see them.

Q. You did not see them?

A. No, checks come in from every place.

Q. You do know that in your home office Mr. Northrup negotiated over that policy for a period of months?

A. This policy was written on a premium return plan, and there never was negotiations because there never was any agreement [266] as to how it should be written until after the policy was cancelled. We had a bad deal, we wanted to get out.

Mr. Sager: Now, subject to the question I asked him which he took some time to answer, he had to examine that exhibit—that is all of the cross-examination I have, I would like to have the opportunity——

The Court: Anything further Mr. Peterson?

Mr. Peterson: Nothing further, Your Honor.

Your Honor, I have some interrogatories if Your Honor wants to take the time, we are not going to be long this afternoon.

The Court: I want to ask the witness a question or two.

When you were negotiating to write this coverage, to whom were you looking for your payment of premium?

A. You mean, the Lytle and Green——

(Testimony of I. C. Rowland.)

The Court: Yes.

A. Lytle and Green.

The Court: And not to the government at all, nor any agency of the government?

A. No.

The Court: Did you know at that time that Lytle and Green were expecting to charge back to the government as an item of costs any premium that they would pay on this coverage?

A. I just assumed that, because that would be the natural course.

The Court: Had you seen the contract of employment between the government and Lytle and Green? [267]

A. No, sir.

The Court: But, did you then in any way rely upon the telegram that came signed "MacDonald," which is in this record I think as Exhibit 2, or 3, authorizing such coverage as may be necessary.

A. It had no bearing on it, because when I knew about that the coverage had already been effected.

The Court: Did you know this was a cost plus fixed fee contract?

A. Yes, I did. I knew it because Mr. Rice had told me it was a cost plus, and I knew the contractors on the highway were all under cost plus.

The Court: Then, when Rice wrote you a letter some time in February, I think, 1943, which is in this record as Exhibit—I can't give the number of the exhibit now. Anyway, it is a letter wherein he said he was surprised—he expressed in substance he

(Testimony of I. C. Rowland.)

was surprised that the matter had not been settled, and that the matter would be taken up with the Public Roads Administration, after you had submitted a bill for some sixteen thousand dollars. Did you then know that it was going to require, if it were charged as an item against this contract, some action on the part of the Public Roads Administration?

A. Well, I assume inasmuch as it was a cost plus contract that they were going to get the money from the government to pay. As I understood, there was some question as to their ability to finance the whole work.

The Court: Well, but did you understand the government was going to exercise some judgment in whether they would or would not pay the bill?

[268]

A. None at all. Rice told me that he had to get the money from the government before he could pay me.

The Court: And you looked to Rice for payment, or Lytle and Green, irrespective of whether the government allowed the claim or did not allow it?

A. Lytle and Green was the assured, and they were the only ones we could look to get our money.

The Court: When they advised you in their letter they were taking it up with the Public Roads Administration, you drew from that the inference they were just going to submit it?

(Testimony of I. C. Rowland.)

A. And get the money, and it would be reimbursed to them, and pay us.

The Court: If they did not get the money, what thought did you give to it?

A. We told them we were going to force collection or our premium. They owed us the money and we wanted it. We made several demands, verbally, and had sent representatives from our office back there.

The Court: But, did you or did you not understand—

Mr. Peterson: Letter of January 30th.

The Court: It was offered here as an exhibit, the original was.

The Clerk: I thought it was in the file.

The Court: I think there are copies of it running all through. Wasn't the original offered here?

Mr. Sager: Yes, the original.

The Court: One of the early exhibits.

Mr. Peterson: Written on Lytle and Green [269] stationery.

The Court: It is Plaintiff's Exhibit No. 14, wherein Mr. Rice said or wrote:

"Mr. Peterson of the Lytle and Green Seattle office is here at this time and expects to return to Seattle next week. I am asking him to take this up immediately with the P.R.A. office and try to get the matter disposed of without further delay."

Now, just what did you understand from that, Mr. Rowland?

(Testimony of I. C. Rowland.)

A. I understood that they were going to—that they probably could not pay the premium right at that time, and they wanted to get the money from the P.R.A. themselves in order to give me a check.

The Court: You did not conclude that they meant to infer or have you infer from this that as soon as the P.R.A. would recognize the claim, then it would be adjusted?

A. No. Frequently on these—

The Court: “It should have been paid long ago and we regret that it has not been properly taken care of.”

Now, what did you understand they meant when they said, “It should have been paid”, if they were to pay it?

A. We were asking them for the money all the time, and billing them for it, and having our field men call on them.

The Court: Well, did you interpret this language to be: “We should have paid the bill long ago”? [270]

A. Yes, they recognized they owed us the money.

The Court: “And we regret it has not been properly taken care of”.

A. We assumed from that they needed the financing in order to meet the bill the same as they had done on all other jobs,—all other parts of this job.

The Court: Well, in your negotiations with these

(Testimony of I. C. Rowland.)

people and in writing this coverage, did you assume that they could incur obligations and charge them against this job and have the government pay them?

A. I didn't know what the provisions of their contract with the government was, other than it was a cost plus contract, and generally on cost plus contracts the contractor bills the principal.

The Court: But, he can only charge such things as are essentially necessary to the project?

A. He couldn't charge anything that was not necessary.

The Court: And somebody has to exercise judgment and discretion in saying what is necessary and what is not necessary? A. Yes, sir.

The Court: And who did you think had that discretion?

A. Mr. Rice is the only man I knew.

The Court: That is all, I think—I just wanted to get that clear, because it is a matter of considerable importance in the case. [271]

By Mr. Sager: (Continuing)

Q. Well, Mr. Rowland, you understood from this letter that he was taking it up with the P.R.A., to either get the money from them or to get their reaction to it?

A. No, there was no reaction to come, to get the money I supposed.

Q. You said you made several oral demands for payment of this? A. Yes, sir.

(Testimony of I. C. Rowland.)

Q. Who did you make that upon?

A. I was in Sioux City once myself. I can't figure the dates, and following Miller's trip I had Jacobson, I believe, and I had Dahl.

Q. Who were they?

A. They were employees of our office.

Q. Well, did you make any oral demands yourself?

A. Yes, when I was in Sioux City I asked him for the money.

Q. From Mr. Rice? A. Yes.

Q. What did he say them?

A. He said it would be forthcoming.

Q. Well, from the P.R.A.?

A. No, he never—he just said it would be forthcoming. It would be paid.

Q. Didn't you—you knew at that time that this thing was being talked about and discussed by Mr. Northrup and Mr. La Rocque that there was a dispute on it, about the—

A. About Lytle and Green?

Q. Yes. A. No, he did not know that.

[272]

Q. Didn't you have these letters back and forth?

A. I haven't seen any letters that show any dispute as to Lytle and Green. It is all Okes Construction. This policy was written against a firm bid in competition with three or four other people. There was nothing to talk about.

Mr. Sager: I move that be stricken because it was not responsive.

(Testimony of I. C. Rowland.)

The Court: Oh, it may stand.

Q. Did you have a copy of this letter from Mr. LaRocque?

Mr. Peterson: What is the date of the letter?

A. The letter is December the 16th, 1942.

Mr. Peterson: I think that is immaterial. That was after the cancellation, Your Honor, and this thing was completed.

The Court: He may answer, objection will be overruled.

A. I can't tell you whether I have a copy of that letter or not. It does not show that a copy was sent to me.

Q. Do you remember ever seeing a copy of it?

A. No, I don't know.

Q. Will you examine the next letter under it and tell me whether you received a copy of that?

A. This letter does nothing but say "We discounted our premium 50 per cent from the usual manual premium".

Q. The letter will speak for itself. I was just asking if you had a copy of it.

A. You ask if I have a copy of this?

Q. Yes.

A. I can't tell you. It does not show any copy of it. [273]

Q. Now, Mr. Howland, did you make or have any of your men make oral requests for payment before you sent the bill in October?

A. You mean, that was the sixteen thousand dollar bill?

(Testimony of I. C. Rowland.)

Q. That is right.

A. Well, we had sent them in statements every month, ever since the policy was written requesting payment of the deposit premium, and then when we ascertained the developed premium we made requests each month for that.

Q. And did you make any oral request?

A. Whenever there was anybody in Sioux City from the office, that is one of the things they were supposed to do.

Q. What did they report back to you?

A. I don't recall any report. It would not be necessary for them to make any specific report.

Q. Did they report to you each time it would be forthcoming promptly?

A. I say, I can't recall what reports they made.

Q. From the time—from September 1st when the policy was cancelled until this letter of January, you made repeated requests for payment?

A. They received a statement and invoice and request for payment each month.

Q. And you made several oral requests also?

A. I think so.

Q. You say there never was ever any explanation as to why it was not paid, except it would be forthcoming?

A. I can't recall what any of these men reported back, because an account as much as that, involving that much money, you assume you are going to get your money. [274]

(Testimony of I. C. Rowland.)

Q. Didn't you know, as a matter of fact, during that time the reason it was not paid was because they were negotiating with your home office?

A. I can't agree with that.

Q. What is that?

A. I can't agree with that.

Q. Didn't you know that was the fact?

A. Not on this Lytle and Green account.

Q. Was there any other explanation why it was not paid for a period of four months?

A. No.

Q. And yet you were billing them?

A. We were billing them constantly, and that is nothing unusual in the handling of our business with these large accounts.

Q. No explanation all that time as to why it was not being paid?

A. Other than it would be forthcoming.

Q. That was the response each time?

A. They never raised any question about rates to us—Lytle and Green never criticised the rates. They were happy it was a very substantial reduction over what they previously had been paying. I bid on it, and I gave them a good rate, and a good cover, and they were satisfied with it as the correspondence shows.

Q. And I understand that you were unaware of negotiations during this period of time between Mr. La Rocque and Northrup?

A. As to the rate on Lytle and Green. There were negotiations all the time on the other. [275]

Q. Didn't Mr. Northrup in this meeting in

(Testimony of I. C. Rowland.)

Washington tell you they would not pay that premium?

A. He told me so many thinks I couldn't keep track of them.

Q. You would not say he did not say that?

A. I would not make a statement like that.

Mr. Sager: That is all.

Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, on this so-called army plan or comprehensive coverage we have been talking about here, was there any occasion for calling for bids?

A. No, there was no reason for calling for bids. It plainly states—that is the cost plus plan you mean, you call the army—

Q. At least, they converted it, the United States business, into a cost plus business with this war situation, is that the situation?

A. In a measure, yes.

Q. And the amount the carrier, or the insurance carrier received was what, a fixed fee or a fixed percentage?

A. Oh, it is all worked out on a schedule. They allow an insurance—

Q. I don't want to go into the details, but in its final analysis it is what?

A. It is a fixed fee, in measure.

Q. You get a fixed fee, and the fee, is it fixed so that one company can't bid four cents and another seven, or something else?

(Testimony of I. C. Rowland.)

A. No, you can adopt a certain base rate for policy-writing [276] purposes, but those rates are all pretty generally set.

Q. Anybody takes that, they take it on the same basis? A. On that plan, yes.

Q. Yes.

Mr. Peterson: Now, while we are on this matter, Counsel, the Court might have been misled about this fifty per cent proposition. I want to read this letter while it is fresh here, this letter is addressed to Northrup on December 16th, 1942, by Mr. La Rocque:

“Lytle and Green Construction Company, et al., Alcan Highway.

“Under date of November 24th, I wrote you complying with your request for a breakdown of the manual premiums that would normally have applied for the exposures of this risk at the time we carried it, and the premium actually developed under our over all average rate for the comprehensive policy, which included automobiles, our premium was less than 40 per cent of the developed manual premium on the same exposures. In other words, we discounted our rates considerably more than 50 per cent so that our charge of 85 per cent per \$100.00 or pay roll does not seem at all out of line. We would appreciate your comments. We are anxious to get our earned premium settled out by the end of the year if possible.”

Now, that is the letter.

(Testimony of I. C. Rowland.)

Q. Mr. Rowland, in making this insurance did you deal with anybody other than Mr. Rice.

A. No.

Q. And in making—sending your bills, did you look to anybody [277] but Lytle and Company and Green Company to pay the bill? A. No.

Q. If they don't pay it you understand you are out? A. That is right.

Mr. Peterson: That is all.

Recross Examination

By Mr. Sager:

Q. You did negotiate with Mr. Northrup on at least three occasions?

Mr. Peterson: He has gone over that at least twice.

Court Court: I think so.

(Witness Excused)

Mr. Peterson: Before I lose this, I want to introduce it. It is the termination,—may it take number 11, because that is one that was withdrawn.

The Court: It may be admitted.

Mr. Peterson: And it is agreed that a copy there from Lytle and Green may go in, Mr. Sager?

Mr. Sager: Yes.

(Whereupon, correspondence referred to was then received in evidence and marked Plaintiff's Exhibit No. 11.)

PLAINTIFF'S EXHIBIT No. 11

August 31, 1942.

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

We, having placed our insurance in connection with our work on the Alaska Highway from Slana, Alaska to Canadian Line, with another insurance company whose policy is effective at 12:01 a.m., September 1, 1942, do by this letter request and direct that you cancel as of midnight, August 31, 1942, your policy No. CLP 1750, which was effective on June 17, 1942, at 12:01 a.m., and as to accidents or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

C. F. LYTLE & GREEN
CONSTR. CO.

By GEORGE ROACH
Attorney in Fact.

August 31, 1942.

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

We, having placed our insurance in connection with our work on the Alaska Highway from Slana, Alaska to Canadian Line, with another insurance company whose policy is effective at 12:01 a.m., September 1, 1942, do by this letter request and direct that you cancel as of midnight, August 31, 1942, your policy No. CLP 1750, which was effective on June 17, 1942, at 12:01 a.m., and as to accidents or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,
(Sgd.) IRA VAN BUSKIRK

August 31, 1942.

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

We, having placed our insurance in connection with our work on the Alaska Highway from Slana, Alaska to Canadian Line, with another insurance company whose policy is effective at 12:01 a.m., September 1, 1942, do by this letter request and direct that you cancel as of midnight, August 31, 1942, your policy No. CLP 1750, which was effective on June 17, 1942, at 12:01 a.m., and as to accidents or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

SEARS CONSTRUCTION CO.

(Sgd.) LEO L. LAWTON,

Gen. Supt.

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

We, having placed our insurance in connection with our work on the Alaska Highway from Slana, Alaska to Canadian Line, with another insurance company whose policy is effective at 12:01 a.m., September 1, 1942, do by this letter request and direct that you cancel as of midnight, August 31, 1942, your policy No. CLP 1750, which was effective on June 17, 1942, at 12:01 a.m., and as to accidents or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

FRANK EBLEN

HILDING EKDAHL

cb

Copy sent to Home Office signed:

EBLEN & EKDAHL

HILDING EKDAHL

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

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Yours very truly,

V. S. LUNDEEN, INC.

By V. S. LUNDEEN,

Pres.

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.
Gulkana, Alaska
November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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Yours very truly,

WILLIAM HORRABIN CON-
TRACTING COMPANY

By A. F. McMAHAN,

Secy.

Iowa City, Iowa.

Request sent to Home Office signed

WILLIAM HORRABIN CON-
TRACTING COMPANY

W. R. HORRABIN,
Pres.

Letterhead of

C. F. Lytle Company and Green Construction Co.
Gulkana, Alaska
November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

WESTERN ENGINEERING CO.

By R. A. FINLEY

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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No. CLP 1750 of the Phoenix Indemnity Company
dated 12:01 a.m., June 17, 1942.

Yours very truly,

L. PETERSON

Contractor

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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No. CLP 1750 of the Phoenix Indemnity Company
dated 12:01 a.m., June 17, 1942.

Yours very truly,
WELDEN BROS
E. WELDEN,
Partner

cb

Letterhead of
C. F. Lytle Company and Green Construction Co.
Gulkana, Alaska
November 18, 1942

Phoenix Indemnity Company,
Hansen & Rowland, Inc. of Alaska,
General Agents,
201 Washington Building,
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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No. CLP 1750 of the Phoenix Indemnity Company
dated 12:01 a.m., June 17, 1942.

Yours very truly,

DUVALL & MCKINNEY

DUVALL & McKINNEY

By K. DUVALL

Partner

Copy sent to Home Office signed:

DUVALL & McKINNEY

By HARRY R. McKINNEY

Co-Partner

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,

Hansen & Rowland, Inc. of Alaska,

General Agents,

201 Washington Building,

Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,
J. LEO HOAK

cb

The Court: Now, we will take an intermission until 2:00 o'clock this afternoon.

(Recess) [278]

2:00 O'Clock P. M.

Mr. Peterson: Will you resume the stand, please, Mr. Rowland?

I. C. ROWLAND

resumed the stand for further examination and testified as follows:

Mr. Peterson: Are you through?

Mr. Sager: I had one question I reserved.

Mr. Peterson: We have interrogatories to read. I thought he might be able to—he didn't have an opportunity to take them with him.

Redirect Examination

By Mr. Sager:

Q. Did you have an opportunity to check?

A. I couldn't find anything in that file.

(Testimony of I. C. Rowland.)

Q. What did you say, Mr. Rowland?

A. I haven't been able to find any of those letters in those files, yet.

Q. Any of the originals?

A. No. There are some other letters that Mr. Peterson has that I didn't have at noon time.

Mr. Sager: You have to make some further examination?

A. I have to check those he has here.

Mr. Sager: Pardon, then we will let that go.

The Court: I wanted to ask Mr. Rowland another question or two. Will you let me see Plaintiff's Exhibits? [279]

Now, Mr. Rowland, did you introduce, or your counsel did in your behalf, certain exhibits here which were apparently intermediate reports concerning pay roll. One of them is Exhibit 6, which Exhibit you will notice (handing Exhibit to witness), and another, 9, and both seem to cover the same period of time. One appears to be a copy.

A. A copy of the other, yes.

The Court: It was made in your office, apparently, and then certified?

A. No, these were both made by the contractors.

The Court: It appears to have been made on your letterhead?

A. Well, these are forms that we had. These are forms that we printed and supplied the contractor with, for the purpose of making these monthly declarations.

(Testimony of I. C. Rowland.)

The Court: But, they are duplicates of one another, covering periods from July 16th to July 31st?

A. Yes, sir, these cover the same period.

Mr. Peterson: I think they were furnished in duplicate by Lytle and Green. We will ask to withdraw one of them. We do not desire to duplicate.

The Court: They are both apparently certified by Lytle and Green, and one though, is on the letter-head of Lytle and Green, is it not, the first one, if you will turn the page?

A. No, that is just the letter transmitting it.

The Court: But, it is Lytle and Green that made [280] the transmittal?

A. Yes, Lytle and Green transmitted it to us.

The Court: It is now then 7—Exhibit 7—8, evidently a similar document for a different period of time. That is from August 1st to August 15th.

A. Yes, sir.

The Court: And then, 8 is the Seattle pay roll of Lytle and Green covering the whole period of time from June 17th to August 31st?

A. Yes, sir.

The Court: Now, where are the similar proofs in reference to the other periods of time that you contend here you are entitled to a premium on, that is, from August 15th to August 31st and from June 17th to July 16th?

A. Mr. Peterson must have them.

The Court: Do you have similar documents?

A. Yes, sir, we have them for the whole period.

The Court: In checking these exhibits here—

(Testimony of I. C. Rowland.)

Mr. Peterson: Your Honor, may I suggest this——

The Witness: Oh, that is the one that was given to us for the first period.

Mr. Peterson: By the P.R.A.?

The Court: That is Plaintiff's 10, I think.

A. That covers the first period, you see, up to July the 15th. It is marked at the top there.

The Court: But, it does not show a calculation of any particular sum that is approved by virtue of that pay roll?

A. No. [281].

The Court: Well, then, where is the pay roll upon which you relied that covers from August 15th to August 31st?

Mr. Peterson: I did not introduce that, Your Honor. We have it.

The Court: Then, did you have a document similar to Exhibit 10 that covered each of these exhibits that have been referred to, 9, and 7, and 8?

A. I believe we did, but I have to check to see.

The Court: Well, that is all. That is what I wanted to get, that cleared up and I have nothing that I have been able to find in these exhibits that covered the period from July 15th to August 31st.

Mr. Peterson: I think, Your Honor, that was covered in the request for admissions, was it not?

Mr. Sager: It is my recollection that your request for admissions covered the entire period.

Mr. Peterson: Yes.

(Testimony of I. C. Rowland.)

Mr. Sager: And I assumed when you were putting in these exhibits—I did not check them too carefully, I presumed you were covering the same ones that were covered in your requested admissions.

Mr. Peterson: Yes, there is a photostat of it.

The Court: That is the period from——

Mr. Peterson: From July.

Mr. Sager: From 8-16 to 8-31.

The Court: No, August 16th to August 31st.

Mr. Peterson: August 31st, '42.

The Court: That is the one I don't seem to [282] find. No. 7 covers August 1st to August 15th.

The Witness: August 7th is this one, that is from July—August 1st to August 15th, yes.

Mr. Peterson: Your Honor, if I may have an opportunity I am sure I have it. I will examine my file which can be introduced later, unless the Court wishes it now.

The Court: I think it should be introduced before the case is closed, so that it may be given consideration together with the others.

Mr. Peterson: Any objection to introducing the photostat?

Mr. Sager: No.

The Court: Exhibit 10 has no calculation at all.

Mr. Peterson: It is on the back, Your Honor. I think you will find it on the last page. Am I correct in that?

The Court: No.

Mr. Sager: You have to turn the whole exhibit

(Testimony of I. C. Rowland.)

right over, Your Honor, and I think you will find it, the penciled notation of the total.

The Court: \$309,821.42 is the pay roll, and that covers the period to July 16th.

Mr. Sager: Including the 15th, yes.

The Court: Including the 15th. Very well.

Mr. Peterson: May I introduce it at this time, a photostat copy of the one which is missing, with the understanding I may substitute the original for it if I can find it? [283]

The Court: Any objection, Mr. Sager?

Mr. Sager: No, Your Honor.

The Court: What number?

The Clerk: Number 17.

Mr. Peterson: It is understood it is introduced?

The Court: Yes, it will be admitted in evidence.

Whereupon, photostat referred to was then received in evidence and marked Plaintiff's Exhibit No. 17.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 17

Hansen & Rowland, Inc., of Alaska
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowanees, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company

Green Construction Co.

and/or	\$ 10,666.76*	\$ 333.33
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Frank & Orville Eblen	13,710.16	212.08
-----------------------------	-----------	--------

Ira Van Buskirk	13,758.98	607.28
-----------------------	-----------	--------

Gus Osterman	14,155.83	172.72
--------------------	-----------	--------

E. M. Dusenberg, Inc.	25,928.94	109.90
----------------------------	-----------	--------

Sears Construction Co.	14,118.86	214.00
-----------------------------	-----------	--------

J. W. Shothorn Construction	13,439.07	503.85
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Frank Eblen & Hilding Ekdahl.....	11,109.45	100.00
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V. L. Lundeen, Inc.	12,170.35	
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Wm. Harrabin Contracting Co.....	13,859.50	100.00
----------------------------------	-----------	--------

Western Engineering Co.	17,335.93	291.18
------------------------------	-----------	--------

L. Peterson	11,697.15	
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Weldon Brothers	19,145.88	155.47
-----------------------	-----------	--------

Duvall & McKinney	21,307.50	302.57
-------------------------	-----------	--------

J. Leo Hoak	31,212.18	605.96
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Others (List below)

\$243,616.54	\$3,708.34**
--------------	--------------

3,708.34

Gross payrolls this period.....	\$247,324.88
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* Does not include payroll for employees in Lytle & Green office, Seattle, Washington.

** Adjustment and supplementary payrolls covering periods from July 15th, 1942 to August 31st, 1942 inclusive.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 17—(Continued)

Payroll Period 8-16-42 to 8-31-42 inclusive.

Previous total	\$491,416.82
Total this period	247,324.88
<hr/>	
Total to date	\$738,741.70
	.85
<hr/>	
Premium to date	\$ 6,279.50
Less previous premium	4,177.04
<hr/>	
Premium this period	\$ 2,102.26
<hr/>	
Total Remuneration	\$247,324.88
Rate .85c	
Earned Premium	\$ 2,102.26
<hr/>	

C. F. LYTLE COMPANY &/or
GREEN CONSTRUCTION CO.

By
Title Asst. Office Manager.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 17—(Continued)

STATEMENT OF EXPENDITURE OF WAGES No. 3

D.O. No.	Contractor	Pay Period	Gross	Board & Room	Net
	Totals f'wd. from Statement No. 2		\$491,416.82	\$55,286.00	\$436,130.82
43	Sears Construction Co.	8-16 to 8-26 Adj.	\$ 187.00	15.50	171.50
43	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-25 Adj.	83.33	15.00	68.33
46	Ira Van Buskirk	8-16 to 8-31 Reg.	13,758.98	1,608.00	12,150.98
47	C. F. Lytle Co. & Green Constr. Co.	do	10,666.76	1,896.00	8,770.76
48	Gus Osterman	do	14,155.83	1,515.00	12,640.83
49	Western Engineering Co.	do	17,335.93	1,926.50	15,409.43
50	Duvall & McKinney	do	21,307.50	2,213.00	19,094.50
51	J. W. Seothorn Construction Co.	do	13,439.07	1,524.00	11,915.07
52	Sears Construction Co.	do	14,118.86	1,521.00	12,597.86
53	Frank Eblen & Orville Eblen	do	13,710.16	1,632.00	12,078.16
54	Welden Bros.	do	19,145.88	1,956.00	17,189.88
55	Wm. Horrabin Contracting Co.	do	13,859.50	1,632.00	12,227.50
56	J. Leo Hoak	do	31,212.18	3,718.50	27,493.68
57	Frank Eblen & Hilding Ekdahl	do	11,109.45	1,275.00	9,834.45
58	V. L. Lundeen, Inc.	do	12,170.35	1,341.00	10,829.35
59	L. Peterson	do	11,697.15	1,248.00	10,449.15
60	E. M. Duesenberg, Inc.	do	12,873.63	1,518.00	11,355.63

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 17—(Continued)

Statement of Expenditure of Wages No. 3—(Continued)

D.O. Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
62	E. M. Duesenberg, Inc.	8-16 to 8-31 Reg.	13,055.31	1,516.50	11,538.81
116	J. Leo Hoak	7-16 to 7-31 Adj.	30.40		30.40
116	Duvall & McKinney	7-16 to 7-31 Adj.	8.80		8.80
116	Wm. Horrabin Contracting Co.	7-16 to 7-31 Adj.	87.50	15.00	72.50
116	Ira Van Buskirk	7-16 to 7-31 Adj.	8.50		8.50
116	Sears Construction Co.	7-16 to 7-31 Adj.	27.00		27.00
116	Frank Eblen & Hilding Ekdahl	7-16 to 7-31 Adj.	100.00	24.00	76.00
117	Duvall & McKinney	8- 1 to 8-15 Adj.	66.70		66.70
117	E. M. Duesenberg, Inc.	8- 1 to 8-15 Adj.	28.83		28.83
118	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-31 Adj.	200.00	24.00	176.00
118	J. Leo Hoak	8-16 to 8-31 Adj.	19.80		19.80
118	Ira Van Buskirk	8-16 to 8-31 Adj.	6.75		6.75
118	Western Engineering Co.	8-16 to 8-31 Adj.	9.65		9.65
128	J. Leo Hoak	7- 1 to 7-15 Adj.	158.26	16.50	141.76
131	Ira Van Buskirk	7-15 to 8-31 Adj.	592.03		592.03
132	J. Leo Hoak	8-16 to 8-31 Adj.	397.50	24.00	373.50
133	Welden Bros.	8- 1 to 8-31 Adj.	155.47		155.47
134	Sears Construction Co.	8- 1 to 8-31 Adj.	.00		.00
135	Western Engineering Co.	8- 1 to 8-31 Adj.	281.53		281.53

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 17—(Continued)

Statement of Expenditure of Wages No. 3—(Continued)

D.O. Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
136	Duvall & McKinney	8- 1 to 8-31 Adj.	227.07		227.07
137	E. M. Duesenberg, Inc.	8- 1 to 8-31 Adj.	81.07		81.07
138	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-31 Adj.	25.00		25.00
139	Frank Eblen & Orville Eblen	8-16 to 8-31 Adj.	212.08		212.08
140	Wm. Horrabin Contracting Co.	8-16 to 8-31 Adj.	12.50		12.50
151	C. F. Lytle Co. & Green Constr. Co.	8- 1 to 8-31 Adj.	25.00		25.00
151	Gus Osterman	8- 1 to 8-31 Adj.	172.72		172.72
152	J. W. Scothorn Construction Co.	7-15 to 8-31 Adj.	503.85		503.85
Totals as of August 31st, 1942:			<u>\$738,741.70</u>	<u>\$ 83,460.50</u>	<u>\$655,281.20</u>

[Endorsed]: Admitted Sept. 8, 1944

(Testimony of I. C. Rowland.)

Mr. Peterson: Mr. Rowland, just another question.

Redirect Examination

By Mr. Peterson:

Q. You consulted your date book to ascertain the date of your meeting with Mr. Northrup in Washington, D. C.? A. Yes.

Q. During August, or during July?

A. July.

Q. What date was that?

A. July the 11th.

Q. That was on Saturday?

A. On Saturday, yes.

Q. Yes. Now, I ask you whether or not the—or what was discussed between you and Mr. Northrup at that time?

A. The Okes Construction Company.

Q. At that time had you prepared the policy on the Okes Construction Company matter? [284]

A. No.

Q. Now, was there any discussion at all of the Lytle-Green matter? A. No.

Q. Was there anything said at that time about the payment or his refusal to pay the premium, or his telling you he would not pay the premium on that? A. No.

Q. The policy on that was written on July——

A. The latter part of July.

Q. Now, following your discussion what was the nature of this discussion, was it amicable or otherwise, with Mr. Northrup?

(Testimony of I. C. Rowland.)

A. Oh, yes, friendly.

Q. Following that, did you come back and prepare the policy, or have the policy prepared on the Okes Construction Company matter?

A. Yes.

Q. And that was delivered?

A. Delivered to the Okes Construction Company.

Q. I understand, and that closed that incident, so far as policy delivery was concerned?

A. Yes.

Mr. Peterson: I think that is all, Mr. Rowland.

(Witness excused.)

Mr. Peterson: If the Court pleases, I wonder if we may have Mr. Sager's last exhibits, so that Mr. Rowland may examine those. [285]

Mr. Polk, will you resume the stand?

C. G. POLK,

a witness for the defendants, was recalled for further cross-examination and testified as follows:

Cross Examination

By Mr. Peterson:

Q. Mr. Polk, you knew of the fact, I assume, that this insurance had been provided in accordance with the contract, public liability?

A. I was not very familiar—

Q. Well, you knew of the fact, didn't you?

A. All I knew, there was some insurance. I didn't know any of the details.

(Testimony of C. G. Polk.)

Q. Was there any other insurance other than this on public liability between June 17th and September 1st? A. Not to my knowledge.

Q. No insurance covering this area outside of the 155 miles? A. For Lytle and Green?

Q. By Lytle and Green?

A. Not to my knowledge.

Q. Well, would you have known it had there been?

Mr. Sager: I submit he has answered, Your Honor. He asked whether he would have known. It is not proper.

The Court: I think that perhaps calls for a conclusion.

Mr. Peterson: Well, you may step aside.

(Witness excused.) [286]

Mr. Peterson: Mr. Northrup, will you please resume the stand?

H. R. NORTHRUP

resumed the stand for further cross-examination and testified as follows:

Cross Examination

By Mr. Peterson:

Q. Mr. Northrup, you, in your relations with this matter, finally became familiar with the insurance on this Lytle-Green job? A. Yes, sir.

Q. Yes. I will ask you whether or not there was any other public liability and property dam-

(Testimony of H. R. Northrup.)

age in force, in favor of Lytle and Green between June 17th, 1942, and September 1st, 1942, other than the Phoenix Indemnity policy?

A. Not for Public Roads Administration work.

Q. Well, I don't—will you explain your answer?

A. I say that merely in fairness, so you understand. I understand Lytle and Green have some other operations up there.

Q. I mean, as far as this road is concerned?

A. That is correct, there is no other insurance.

Q. Oh, I misunderstood you. There wasn't any separate policy on this area, outside of the 155 mile proposition?

A. That is correct.

Mr. Peterson: That is all, thank you.

Mr. Sager: No questions.

(Witness excused.) [287]

Mr. Peterson: Now, if the Court please, we desire to offer the interrogatories and answers to the interrogatories of the witness Harvey L. Rice.

Is it agreeable to you, Mr. Sager, if I read it, or Mr. Conley read the answers and you read it, or read the questions and you read the answers?

Mr. Sager: I have no objection to doing the reading, but I object to that being read into the record because they do not constitute evidence. They are a special means of discovery provided by the rules. They are filed as part of the file, but they do not go in as part of the evidence.

I object to their being read into evidence. It is not a deposition in any sense of the word. There is no cross-examination or anything of that sort.

One of the provisions of the rules providing for discovery, they are filed and they are part of the record, but they certainly are not evidence.

Mr. Peterson: I think we are entitled to, where we submit them and their return is sworn to, we are entitled to put them in.

Frankly, Your Honor, now, I don't want to say—I don't know what the rule is on them.

The Court: Well, it is for the purpose of discovery.

Mr. Peterson: They are for the purpose of discovery.

The Court: And then if you discover anything in those answers, you could follow up, of course, by either subpoenaing the person or taking their deposition, [288] but they themselves, the questions and the answers, to them, do not form evidence in the case—do not become evidence in the case.

Mr. Peterson: As I stated, it seems to me if a letter signed by the parties is admissible in evidence, there isn't any cross-examination about that. That likewise an answer to an interrogatory is a declaration or a statement, and is admissible, but frankly I have not investigated the authorities on it.

The Court: I am convinced, Mr. Peterson, that it is the other way, that you cannot have the result of a discovery rise to the dignity of evidence in the case, but if the discovery results in certain things that you desire to make evidence, you can do it by deposition.

Mr. Peterson: I appreciate that.

The Court: Or by offering the documents that

are disclosed. These interrogatories and the answers are in the files.

Mr. Sager: Well, I filed the answers this morning and I assumed Mr. Peterson filed the interrogatories.

The Court: They were considered, yes.

Mr. Peterson: That is the plaintiff's—the plaintiff rests.

Mr. Sager: Excuse me just a moment. We have no further evidence. Well, I am reserving this one question for Mr. Rowland.

The Court: Yes. [289]

I. C. ROWLAND

resumed the stand for further cross-examination and testified as follows:

Cross Examination

By Mr. Sager:

Q. You have examined that exhibit now, Mr. Rowland? A. Yes.

Q. And what is the exhibit number again?

A. Defendant's Exhibit A-5.

Q. Now, it consists of a group of letters and copies of letters? A. Yes.

Q. And my question to you is, did you receive copies of the letters written by Mr. La Rocque contained in that exhibit?

A. I can only find copies to the letters that are marked "cc-Mr. Rowland."

Q. Only those? A. Yes, sir.

Q. Now, with respect to that portion of the

(Testimony of I. C. Rowland.)

exhibit which are carbon copies, did you receive copies of those letters?

A. Well, frankly I haven't checked them all. I can't find them in the file, and I don't want to say I have not received them, because I may have received them.

Q. You know those are the ones I submitted to you a few days ago?

A. Yes, those are, and I checked in Mr. Peterson's office—I got copies of those.

Q. Those are the carbon copies there, then?

[290]

A. Yes, sir.

Q. So the only ones you did not receive copies of are the originals which are not marked carbon copies to you?

A. Yes, that is correct. I can't find any copies.
(Witness excused.)

The Court: Is there anything further, Mr. Sager?

Mr. Sager: No, we have no further evidence.

The Court: Well, I assume counsel are ready at this time then to proceed with the arguments, and I think that I should state my position so that we can probably shorten the argument or eliminate it. The position of the Court at this time in reference to certain issues here involved, may be stated as follows:

This action was commenced by the plaintiff against the defendant on the theory that it was an account stated.

The defendant moved against the Complaint by seeking further information by way of Bill of Particulars, and upon argument made in support of that motion the contention was advanced by the plaintiff that his Complaint alleged an account stated and therefore was not subject to a Bill of Particulars, which issue was so found. For the purpose of determining whether at that stage of the proceedings it was an action based upon an account stated, the Court proceeded with what might be designated a pre-trial hearing and determined at that time, insofar as it involved the question of [291] supplying information by way of Bill of Particulars, that it was in fact an account stated, and denied the application for a Bill of Particulars.

The defendant then answered in a First Amended Answer, I think it was, with an affirmative defense stating in substance that the matter was still under negotiation at the time the letter was written by the defendants to the plaintiff, upon which the plaintiff rested his claim that he was suing on an account stated, and alleged that further consideration was being had with the federal officials, particularly, I think, the Public Roads Administration.

Then at the commencement of this trial a Second Amended Complaint was filed, carrying the same affirmative matter, and adding a second affirmative defense, alleging that the employees engaged in these undertakings were Civil Service employees, and it was by mistake that the defendant had as-

sumed that they were employees subject to coverage by this contract of insurance.

Now, after a hearing of all the evidence and a consideration of it, I am satisfied that the facts do not support the contention that this is an account stated.

The letter upon which the plaintiff rested its case is somewhat ambiguous, and it indicated that the defendant had not unqualifiedly accepted the statements submitted as his obligation, but there was something further he sought to have done and someone else he looked to for payment, and that someone else, it is quite evident, after hearing the evidence here, was the Federal Government, who made the contract for the construction of this particular [292] section of highway.

The disposition of this case would be a very simple one for the Court if it did not involve certain unusual and novel features, and an unusual and extraordinary situation.

The government apparently is the only one interested in defending against this claim. Actually this Court can not determine the liability of the government under its contract with Lytle and Green, in this sort of a proceeding and in this kind of a contract. The determination of that issue is one that is administrative in its nature and not judicial by the very Act of Congress that made provision for these cost-plus fixed fee contracts, and whether this was an essential item to be taxed as cost is a matter of determination for a governmental agency, in the executive department of government and not here.

However, the United States Attorney at the request and upon the orders of the Department of Justice has seen fit to come into court and present the defense and to all intents and purposes, virtually abandoned the defense and passed the matter over to the government.

I intimated when this situation was first brought to my attention that if the government desired to invoke the jurisdiction of this Court in determining whether under its contract of employment with Lytle and Green there was any liability on its part, and it felt that it could do so, it ought to intervene in the case. I am not sure that is a procedure which is available under the unusual and exceptional situations that have arisen out of the war emergency which brought about this type of contract. But [293] certainly, Congress never intended that the contracting parties dealing with the government should have a carte blanche to go out and incur expenses at random and without regard to what it finally adds up to, and then load them back on to the government.

Now in this case there is much evidence that in so far as the defendants in the case were concerned, they assumed the government would pay the insurance premium. They were quite indifferent apparently as to whether this item of expense here involved a thousand dollars or a hundred thousand dollars, and upon the meager basis of a telegram from the Chief of the Public Roads Administration, Mr. MacDonald, which was limited in its language, they entered into this insurance contract that as-

sumed a liability for the term of the contract roughly somewhere between sixty and seventy thousand dollars, and the insurance sought and procured was not submitted to the representatives of the P. R. A. nor any other governmental agency at the time.

The evidence is here and the facts will have to be found, that the actual contract of insurance was not written until about the time of the cancellation.

I do not intend, in making a disposition of this case, to make a finding that shall be binding upon either the government as the party who was having the work done, nor the defendants Lytle and Green and the various unit contractors who undertook to do the work, as to the liabilities between them, because it is quite evidence to me that such determination is one which the administrative department of the government did not want or desire to be made, nor should they in any way be bound by the determina- [294] tion that the Court makes now; as between the parties who have submitted themselves to this Court's jurisdiction—that is, the plaintiff and the defendants.

The defense that has been interposed in this case has been, as I have already indicated, sufficient to indicate to me that there was not an account stated, but it is a defense that before the proper tribunal would be a proper defense, if the government were resisting whatever this cost might be, as an item of construction, and the very indifference, and, I might almost say, recklessness on the

part of defendants in incurring this obligation, is proof of the need for extreme vigilance on the part of the representatives of the government, in seeing that abuses do not arise which are the result of unnecessary added costs of construction, though we must recognize that construction such as is taking place during this war period results in extravagance.

The plaintiff can not be criticised, nor can fault be found with it for trying to go out and get this business. That was its right, and to get it on the best terms that it could for itself.

The defendants, however, should be sure of the position that they take in assuming an obligation of this kind in connection with a cost-plus fixed fee contract, that it is a proper item, and if it is not, the responsibility is personal to them, rather than the responsibility of the government.

Now I say these things because evidently the Department of Justice is defending actions similar to this, involving cost-plus fixed fee contracts and does so upon [295] some theory or some belief that the findings will ultimately be binding upon the administrative agency. They should not be and certainly there is no intent in this case that they should be.

The issue as to whether the employees engaged in this work were Civil Service employees has been raised, and the Court has no hesitancy in making a finding that within the provisions of the Civil service Act they were such. Doubtless the primary reason is the one that was briefly indicated by one

witness this morning—that is, the appropriations for this work at that time provided that none of them shall be expended nor paid to any person who is a member of any subversive group or organization, and in order to meet that requirement by an arrangement where the government is paying checks direct, the Civil Service arrangement came into being. The facts are clear that the employees were recruited almost entirely by the contracting parties with the approval of the government, and when they met the limited tests required here, they were accepted on a Civil Service status, but were, after all, in fact, the employees of the contractors, receiving instructions and orders from them and not being subjected to—if the situation even permitted it—they were not subjected to any orders, directions or instructions from the representatives of the United States Government. I think therefore that the fact they were Civil Service employees does not change the situation as to liability as between the plaintiff and the defendants. It might very properly be interposed as an objection to—or a defense by the government, to permitting these items and charges growing out of this insurance contract [296] to be charged as a cost item, but that is a matter that will have to be settled, as I have already stated, by the appropriate administrative agencies of the government unless there be some means or some manner in which it can be brought to this court.

Now from what I have indicated—and I might add further, that I am satisfied from the facts in

this case that the plaintiff fully expected approval of this insurance contract and expected recognition by the government of the premium liabilities. Certain negotiations were carried on between the plaintiff and representatives of P. R. A. after the difference and difficulties arose, seeking to get P. R. A. approval, but that does not change the situation that the negotiations which brought this insurance contract into being—and the contract itself on its face, without equivocation, is a contract of insurance between the Phoenix Mutual Insurance Company, the assignor of the plaintiff in this case, and the defendants, and I shall therefore hold the defendants liable in such a sum as under their contract of insurance had accrued. And again, I desire to state that this holding shall not in any way be construed or considered as a holding that these were legitimate expenses in connection with the government's contract for the construction of the highway. In other words, I am free from the determination of that question, because it is not before me, excepting inferentially by virtue of the appearances made here, and the evidence offered. The total failure of the real defendants in the case to show any interest in this litigation, evidently proceeding on the assumption that whatever this Court determines is a [297] liability under the issues as here made which will have to be cared for by the federal government, and that is not the intention of the Court, nor should it be. I frankly say if I were determining that issue, my determination would be entirely different than the deter-

mination of the issue between the parties here, because from the statement of the P. R. A. engineers it appears that actual construction work during the interim between June 17th and September 1st was very limited on this contract—or on this highway construction A-1 and A-2. Nevertheless, the contract of employment for construction was in existence and the defendants and their associates had taken scores of men up there and had assumed the responsibility of paying them from the point of recruitment. When they got to Alaska the evidence indicates that some of them were diverted to other jobs. Since I am not in a position now to pass upon the question whether that should be segregated from the work that was actually done in the month of August by these two unit contractors, which amounted to only a small sum—and the defendants have submitted statements against interest binding themselves upon this contract for the full period of time as shown by these exhibits that I have referred to just after the noon intermission, which are specifically:

Exhibit No. 9, covering the period from July 16 to July 31, where they admitted liability of \$2132.16; and

Exhibit 7, covering the period from August 1st to August 15th, where they admit a liability of \$2,044.88; and

Exhibit No. 8, being the Seattle pay roll for the whole period where they admit a liability of approximately [298] \$50.15; and

Exhibit No. 10, where they admit a liability from June 17 to July 15 of \$2632.80; and then

Exhibit 17, covering the last period, from August 16 to August 31, inclusive, where liability is admitted in the sum of \$2,102.26, I shall find that they are liable to the plaintiff in whatever constitutes the aggregate of those sums, and then I think under the provisions of the contract of insurance, there is a further liability that grows out of a cancellation by the assured before the end of the term of the contract. Now what that is I do not know.

Mr. Peterson: That has been computed, Your Honor, by Mr. Tinius, and I think we have agreed, have we not, Mr. Sager, on that matter, that the computation is correct?

Mr. Sager: During the trial it was stipulated that the sixteen thousand dollars—whatever they demanded in their Complaint, is the premium produced by this short rate computation upon the total of one million fifty-five thousand dollars.

The Court: In view of that stipulation the Court will find that the plaintiff is entitled to recover from the defendants, but not from the government, nor from the agency of government that made the contract for the construction of the highway in question, that sum. Formal Findings of Fact and Conclusions of Law may be prepared and submitted, also a Decree.

Mr. Sager: Your Honor does not care for argument? [299]

The Court: I do not think so, Mr. Sager, in view of the fact that—unless there is some particu-

lar feature of what I have said wherein you think I am in error—that is, on the facts themselves, and if you are I will be glad to hear you in that regard.

Mr. Sager: I would like to say briefly, Your Honor, it seems to me that Your Honor is overlooking one matter—I don't know whether it is a question of fact or a question of law. I am not going to argue the question of whether or not these men were government employees or employees of these contractors. I think the evidence is in on that and that is a question for legal interpretation thereafter as to what they constitute.

The Court: No, the Court holds that they were Civil Service employees; that they were given to the contracting parties for the construction of the highway, and I am convinced—I arrive at that conclusion, Mr. Sager, on this ground: I am convinced that if these people, even though they were on the government payroll under this limited Civil Service arrangement, if through their negligence they injured a third person in the course of the performance of this contract, a right of action would have existed against the contractor. Such injured persons would not have been subjected to a claim against the United States Government.

Mr. Sager: Well——

The Court: That is what causes me to arrive at that conclusion.

Mr. Sager: In view of that I would like to make this statement, that the policy provides that the [300] remuneration shall be 85c per hundred dollars

of the remuneration paid to employees of these contractors. Now they either are employees of the contractors within that term "employees", or they are not. They can't be in some middle ground. If they are not employees of the contractors, this premium is not predicated upon that payroll by the very terms of the policy itself. I assume Your Honor has taken into consideration the very familiar rule that an insurance contract is strictly construed in favor of the assured and against the insurer. Now the provision here says "remuneration"—money paid to employees of the contractors. If they are employees of the government, which is our contention here, they are not employees of the assured, and if they are not employees of the assured, then the premium is not to be determined upon the basis of that payroll.

We concede there is some slight actual payroll of insured employees. It is that five or six thousand dollar sum figure shown on one of those exhibits.

Now I don't care to belabor that point further. I want to address myself to this further proposition——

The Court: Mr. Sager, I might for the purpose of satisfying the matter in your mind—I might state to you that the Court is convinced from the evidence in this case disclosing this whole transaction, that the assured, when they made application for this policy and they accepted and assumed the responsibility and obligations thereunder, knew very well the method and procedure under which

they were going to operate, but the insurer had no way of knowing that. [301]

Your argument would be much more persuasive if you were appearing on behalf of the Public Roads Administration, and were resisting this claim.

Mr. Sager: I call your attention to a statement from Mr. Rowland, contained in one of his letters here, which is in evidence,—it is Defendants' Exhibit A-1. It is a letter written by Mr. Rowland on June 27, 1942, addressed to Mr. Northrup. It starts out "Re C. F. Lytle Company and Green Construction, Sioux City, Iowa; Oaks Construction Company, St. Paul, Minn." Then there is a short introductory paragraph, and then it has another reference to C. F. Lytle Co. and Green Construction Company, Sioux City, Iowa, and then some short paragraph under that, and then the reference Oaks Construction Co., St. Paul, Minn. Now in this paragraph is this—or in this letter is this paragraph:

"This constitutes all of the insurance which we have bound up to the present time for either of these contractors, and we have been informed by Messrs. Lytle and Green, and Mr. Marshall and Mr. Morris, that Lytle and Green will not require compensation insurance on their contract, since their employees are all designated as federal employees."

Now this letter was written by Mr. Rowland to Mr. Northrup on June 27, before this policy was

ever actually issued. It was after the binder, but before the policy.

The Court: The policy was not issued until——

Mr. Sager: About July 30th.

The Court: About the time it was cancelled.

[302]

Mr. Sager: They certainly knew the status of these men and the very fact there wasn't compensation insurance—I direct your attention to this, on this Oaks contract, the policy was compensation insurance——

The Court: I appreciate that.

Mr. Sager: There was no compensation insurance on these employees. Why? Because they were government employees, and compensated under the Compensation Commission. This letter recognizes that fact.

The Court: But the government, in connection with the contractors, aided in securing these employees and recruited them and took them to Alaska and put them on the jobs for the very purpose of becoming employees of these contractors. Otherwise, the government would be in a position where it could not have agreed to pay a fixed fee, if it were a government project—a government undertaking, and government employees. The responsibility of each of these employees was first to the contractor, even though he was given a Civil Service status.

Mr. Sager: As I say, Your Honor, I do not want to argue that point too far. I think the evidence is all in here, and if they are government

employees—my only point is that if they are government employees the payroll does not apply. If you hold that they are employees of the contractors within the terms of that provision in the policy why then the payroll does apply.

The Court: The Court holds that they were Civil Service employees, made such only for the convenience of the occasion—that is, in order that the government might disburse public money to the employed of the contractors, and [303] probably for the further consideration that it wanted to save liability and expense that would be incurred by carrying compensation insurance.

You have presented an excellent case if you were defending this action against this item being included as an item of costs in these contracts, but in spite of the fact, Mr. Sager, that you appear here in a sort of a double capacity, yet open and above board in the matter, I can not escape the position I find myself in, which is that I am compelled to make a determination of an issue of fact between two private litigants.

Mr. Sager: There isn't any question about that, Your Honor. We have never questioned the fact of this lawsuit being between Hansen & Rowland and Lytle and Green, and the government, as far as their interest in this lawsuit is concerned, is not before the Court at all, and whatever my capacity is here, I am representing these defendants.

The Court: That is the thing that does trouble the Court, because if the government is not before

it either directly or indirectly, in spirit or materially, and has no interest whatever in the results of this litigation, then Lytle and Green ought to be here, if they have a defense to this action, and the only thing I have from them, the defendants in the case, are their own admissions, in writing as to their liability.

Mr. Sager: Well, now, I want to say a few words, at least on that next point. If—and I am taking now Your Honor's finding there wasn't an account stated, once you wiped out the account stated the burden is then on the plaintiffs to prove the basis for this alleged premium due, this [304] sixteen thousand dollars. Now I will concede that they make a *prima facie* case when they offer the certificate from Mr. LaRocque, showing the total payroll. They are admissions of the defendants and that is the payroll during this whole period of time. From there on, however, there is evidence which is uncontradicted and which I assume serious dispute about, that during the period involved here from June 17 to August 31, that only two of these contractors worked on the sections of the highway, the hundred and fifty-five miles of the highway to which this insurance contract applies.

Now you don't have to consider the government's interests on this phase of this case. Here is a contract between these two parties here in court, a contract prepared by an insurance company with a revised indorsement attached to the insurance policy which if anything, strengthens the rule that it must

be strictly construed in favor of the assured and against the insurer, and it says that the policy applies only to the operations performed at, from, or in connection with the hundred and fifty-five miles from Slana to the Canadian border. There is a sketch in evidence here which shows that hundred and fifty-five miles. The actual work done during this period of time, except for the two contractors, was not done on that section of the highway at all. It was done on an entirely different part, not within the meaning—certainly not any part of the highway within the meaning of the indorsement on the policy. If they are entitled to collect a premium on the payroll on sections 3 and 4, they would be entitled to collect a premium on the payroll of these men associated with these various [305] contractors, wherever they went, because the insurance contract refers specifically to this hundred and fifty-five miles. There are two contractors who worked there—only two during the period involved of the coverage. In addition to that, they are undoubtedly entitled to premiums on the payrolls involved while the men were coming up, because obviously they were coming up there in connection with this particular part of the highway, and they would come within the terms of this insurance policy. But, after they get up there and they go to work on another part of the road—not this hundred and fifty-five miles at all, then certainly that is not payroll attributable to this contract—this premium. The contract itself says only in connection with this hun-

dred and fifty-five miles of highway, and so I think probably the burden shifts to us to overcome the effect of these admissions on the part of the defendants, submitted by the certified payroll records in bi-monthly periods, and it seems to be obviously the evidence here has done so, because it is uncontradicted and little disputed, because there was no employment on those sections of the highway during that period of time.

The Court: Mr. Sager, this insurance is very comprehensive. It uses the term "anything in connection with the contract", and just how far that might be carried I do not know. There is no evidence upon that, except it indicates that they did start to pay employees immediately after they recruited them in Iowa, or Seattle, or from wherever they were taken. They were then selected in connection with this contract. Now, when they got up there they apparently were still employed in connection with the contracts, even [306] though they might have been diverted for a time by the request of the War Department or the request of some other department, but you could very easily overcome the effect of these documents that were admissions on the part of the defendants in a contest as to whether this was an item of cost to be charged against this construction contract, in a cost-plus fixed fee contract. When you try the major issue as to liability for premiums on the insurance contracts and the defendants themselves over their own signatures admit that these employments were in connection

with these construction contracts, it is more than prima facie evidence.

Mr. Sager: Yes.

The Court: So far as the contest between the parties here are concerned.

Mr. Sager: I think, Your Honor,—I don't find anything in this insurance contract which refers to the government's contract. Your Honor indicated that this was in connection with the contract. Now I don't find a thing in the insurance contract which refers back to the government contract, as a contract.

The Court: No, not specifically. It refers——

Mr. Sager: In other words, my position is that you can't bolster or expand or enlarge the provisions of the insurance contract by a reference to the contract between the contractors and the government. In the government contract there is some provision that at the direction of the engineer, he can direct these men to other sections of the highway, but you can't make that a part of this insurance contract, because it is—— [307]

The Court: Mr. Sager, the insurance contract provides that "all operations performed at, from, or in connection with the construction of approximately 155 miles of Alaska highway from Slana, Alaska, to the Canadian Border." That is what it covers.

Mr. Sager: That is right.

The Court: And of course that naturally implies that there must be—must either be or would be,

some sort of an agreement for the construction of such a highway.

Mr. Sager: Oh, but let me ask you this: Suppose these people are up on Section 3-A, a hundred miles distant from these 155 miles that are involved here, and a third party liability occurs, is there any question but the insurance company would say, "Our policy does not cover that. Our policy is restricted to this 155 miles, here, between Slana and the Border", and you way off on another section of the highway, nowhere in that 155 miles? That would be the very first defense the insurance company would set up.

The Court: The Court is not prepared now to say it would be a defense to it.

Mr. Sager: If you can expand that policy to that extent you could spread it over the entire distance of that highway, and I say, certainly the insurance policy does not contemplate that.

The Court: Mr. Sager, do you have any way to explain to the Court at all why Lytle and Green were so completely indifferent, so extremely indifferent in the manner in which they submitted reports at stated periods, asserting the workmen were employed by them, and assuming [308] financial liability?

Mr. Sager: I haven't any information as to what their attitude was before this thing arose. I have had some contact with them since, and frankly I don't think as the Court thinks, they are wholly indifferent. Mr. Rice would have been perfectly willing to come out as a witness. I did not see that he

could have anything that he could add to the government's case. I will say that they thought this policy was a proper policy and they thought it covered what they needed, and until the question of these—who the employees were and whether they were government, or their employees arose, they thought the premium was due. I don't think they have been wholly indifferent.

The Court: How could they have thought they had large numbers of men employed upon the particular stretch of this highway from June 17 to August the 1st, when in fact they did not have any?

Mr. Sager: I don't think they could, and I don't know why they did that, except that I think La-Rocque, who was an office manager, sent down the payroll. He has not even seen the policy but he knows there is a policy written to cover the payroll, and under the policy——

The Court: He certificates they were on this job.

Mr. Sager: Yes, I think that is true.

The Court: I may be in error in the inference drawn from the admitted and proven facts in this case, but I am willing to assume that responsibility, and allow you exceptions to all adverse rulings, and if you will submit Findings, if the parties will, at some stated period of time, and submit a Decree, the Court will consider them and [309] if found in order, sign them.

[Endorsed]: Filed Mar. 15, 1945. [310]

[Endorsed]: No. 11010. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Appellants, vs. Hansen & Rowland, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11010

C. F. LYTLE COMPANY, Inc., a Corporation, and
GREEN CONSTRUCTION COMPANY, a
Corporation,

Defendants-Appellants,

vs.

HANSEN & ROWLAND, Inc., a Corporation,
Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON

Come now the Defendants and Appellants, by their attorneys, the undersigned, and state that they intend to rely on the following points:

1. The pay rolls upon which the claimed premium was allowed with pay rolls of Government employees rather than employees of the named insured's as provided by the terms of the insurance policy.

2. The policy provides that it "shall be applied only to operations performed at, from, or in connection with all, or any part or division of the contracts of approximately 155 miles of Alaska Highway from Slana, Alaska to the Canadian line."

The premium claimed and allowed by the judgment of the Court was erroneously predicated upon operations of portions of the Alaska Highway outside of and beyond the 155 mile Highway from Slana, Alaska, to Canadian line.

J. CHARLES DENNIS

United States Attorney

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Assistant United States
Attorney

Received copy hereof, this 12th day of March,
1945.

CHARLES T. PETERSON

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 20, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Come now the Defendants and Appellants, by their attorneys, the undersigned, and herewith designate to be printed the following portions and parts of the Record on Appeal, which they think necessary for the consideration thereof:

1. Certified copy of record on removal from Superior Court of the State of Washington, to United States District Court for the Western District of Washington.

2. Seconded Amended Answer.

3. Findings of Fact and Conclusions of Law.

4. Judgment.

5. Notice of Appeal.

6. Transcript of Testimony.

7. Statement of Points to be relied upon.

8. Designation of record on appeal.

9. The following exhibits, or designated portions thereof:

Plaintiff's Exhibits 2, 4, 6, 7, 8, 9, 12, 13, 14, 17.

Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-10; and the following portions of A-6:

Pages 1, 2, 3, and 4;

Paragraph 5 of Page 5;

Paragraph 1 of Page 6;

Paragraph (h) of Page 7;

Paragraph 3(c) of Page 8; and
Paragraph I(a) of Page 11.

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

Assistant United States
Attorney

Copy received this 12th day of March, 1945.

CHARLES T. PETERSON

m.e.

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 20, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENTS' DESIGNATION OF ADDI-
TIONAL PARTS OF RECORD TO BE
PRINTED

Comes now Plaintiff and Respondent, by the undersigned, their attorney, and hereby and herewith designates to be printed the following additional portions of parts of Record on Appeal, which they deem necessary for the proper consideration of said Appeal:

1. Plaintiff's Exhibit No. 1.
2. Plaintiff's Exhibit No. 3.
3. Plaintiff's Exhibit No. 5.
4. Plaintiff's Exhibit No. 11.
5. Plaintiff's Exhibit No. 15.
6. Defendants' Exhibit No. A-13.
7. Defendants' Exhibit No. A-14.

and the following additional portions of Defendants' Exhibit No. A-6, to-wit:

1. Paragraph 4 of page 5.
2. Paragraph 6 of page 5.
3. Sub-paragraphs (a), (b), (c), (d), (e), and (f) of page 6.
4. Sub-paragraphs (j), (k) and (l), page 7.
5. Paragraphs 3 of page 8.
6. Paragraphs 1 and 2, page 9.
7. Paragraphs 3 and 4, page 10.
8. Paragraph 3 and sub-paragraph (c), page 11.
9. Sub-paragraphs (d) and (h), page 12.
10. Sub-paragraph (c), page 15.
11. Article X, pages 16-17.
12. Article XI, page 17.
13. Article XII, page 17.
14. Section 5, page 18.
15. Sections 4, 5 and 6 of page 1, Equipment Rental Schedule.
16. Paragraph 14 of page 4, Equipment Rental Schedule.
17. Paragraph 17, page 4, Equipment Rental Schedule.

(Note: Equipment Rental Schedule is attached to and made a part of Exhibit No. 6.)

Dated March 21, 1945.

CHARLES T. PETERSON
Attorney for Plaintiff,
Respondent.

Due service of copy of foregoing Designation is acknowledged this 21st day of March, A. D., 1945.

J. CHARLES DENNIS

HARRY SAGER

Attorneys for Defendants,
Appellants.

[Endorsed]: Filed Mar. 26, 1945. Paul P.
O'Brien, Clerk.